SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 15

E. P. JACOBS AND AUGUSTUS GUNTER, EXECUTOR OF THE LAST WILL OF MRS. S. B. GUNTER, DECEASED, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCIUT COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Poceedings in United States circuit court of appeals, fifth circuit	a	1
Caption.....(omitted in printing)..	a	
Record from district court of the United States, Northern Alabama	1	1
Petition of E. P. Jacobs	3	1
Petition of Augustus A. Gunter	12	6
Order allowing amendment of Gunter petition	21	12
Answer of United States (Jacobs case)	21	12
Answer of United States (Gunter case)	22	13
Mandate United States circuit court of appeals	23	13
Decree of district court on mandate	25	14
Motion for new trial	27	15
Judgment on motion for new trial	31	18
Order consolidating cases	32	19
Final judgment	33	19
Findings of fact and conclusions of law	36	21
Bill of exceptions	45	27
Caption.....(omitted in printing)..	45	
Agreed statement of facts..(omitted in printing)..	46	
Letter of district engineer to E. P. Jacobs (omitted in printing)	50	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 10, 1933

	Original	Print
Testimony of J. H. Rogers..(omitted in printing)..	52	
Sam Mason..(" " ")..	57	
Ed Towles..(" " ")..	61	
Frank Marshall (omitted in printing)	63	
William Whitcher (omitted in printing)	65	
L. H. Hughes.(omitted in printing)..	67	
J. L. Troxell (" " ")..	69	
J. C. Gunter (" " ")..	71	
G. R. Joiner (" " ")..	72	
M. L. Crabtree (omitted in printing)	74	
Matt Brooks (omitted in printing)..	74	
W. B. Neher..(" " ")..	76	
E. P. Jacobs (" " ")..	77	
Jacob C. Lyda (omitted in printing)	80	
Morgan Wilson (omitted in printing)	83	
John T. Wilson (omitted in printing)	85	
J. W. Phillips (omitted in printing)	88	
C. C. Lloyd..(omitted in printing)..	90	
James Schrader (omitted in printing)	92	
C. M. Baker..(omitted in printing)..	94	
Tom Rutter (omitted in printing)..	96	
J. P. Douglass (omitted in printing)	97	
J. P. Stoner..(omitted in printing)..	98	
C. L. Harvey (" " ")..	99	
J. L. McCoy (" " ")..	100	
J. A. Grant..(" " ")..	103	
L. B. Feagan (" " ")..	110	
Phillip B. Hill (omitted in printing)	129	
E. P. Jacobs (recalled) (omitted in printing)	130	
William Whitcher (recalled) (omitted in printing)	133	
Findings of fact and conclusions of law (omitted in printing)	133	
Final judgment	141	27
Motion for new trial and order overruling same	144	29
Order settling bill of exceptions	146	31
Agreement as to original maps..(omitted in printing)..	147	
Petition for appeal and order allowing same	148	31
Assignment of errors	152	33

	Original	Print
Order to transmit original maps, etc. (omitted in printing)	159	
Præcipe for record (" " ")	160	
Clerk's certificate (" " ")	162	
Argument and submission (" " ")	163	
Opinion, Bryan, J.	164	38
Judgment	168	40
Clerk's certificate (omitted in printing)	169	
Stipulation as to printing record	170	41
Order allowing certiorari	171	41

[fols. a-2] [Caption omitted]

[fol. 3]

IN UNITED STATES DISTRICT COURT, NORTHEASTERN DIVISION, NORTHERN DISTRICT OF ALABAMA

E. P. JACOBS, Plaintiff,

vs.

UNITED STATES, Defendant

PETITION—Filed August 13, 1928

To the Honorable William I. Grubb, United States District Judge for the Northern District of Alabama:

Petitioner respectfully represents:

1st. That his full name is Elmer Pruitt Jacobs. Petitioner is now, and for many years heretofore, has been a resident and citizen of Bridgeport, in Jackson County, Alabama, within the Northeastern Division of the Northern District of Alabama, and within the territorial jurisdiction of this Court.

2nd. Your petitioner has a claim against the United States under an implied contract, for compensation for value of property taken by the United States for public use, as hereinafter more particularly stated.

3rd. In October, 1925, and before and after that time your petitioner was, has been and still is the owner of a farm lying along Jones Creek, a tributary of the Tennessee River, situated in Jackson County, Alabama, and described as follows:

[fol. 4] Bounded on the North by the lands of Gunter, Tucker and McCampbell; on the East by Mrs. Gunter; on the South by Whitcher, Rice and Jones Creek, and on the West by McCampbell, containing 417 acres, more or less.

4th. Petitioner further shows that for several years before and after October, 1925, the government of the United States has been and still is in the exercise of its power of eminent domain under the constitution of the United States, and by authority of the Acts of Congress, duly empowering its officers and agents thereto, engaged, among other things,

in the work of improving navigation on the Tennessee River along its course, through the State of Tennessee, and through the State of Alabama. This work has been and is being accomplished by the erection, construction, maintenance and operation of dams, locks and other structures in the bed of the said river and across the channel thereof at strategic locations along the course of said river, designed to obstruct the flow of the current of said river and to dam up and hold the waters of the same so as to deepen the channel, and thereby provide water of sufficient depth throughout the year to facilitate navigation upon said river.

Among other works of internal improvement undertaken and carried to completion by the United States, pursuant to the authority of the Constitution and Acts of Congress, above referred to, was and is the construction, maintenance and operation of a dam across the bed or channel of the Tennessee River in Jackson County, Alabama, a few miles South of the Tennessee State line at a location known as Widow's Bar, which dam is known and designated in the [fol. 5] Engineers Office of the War Department of the United States as Widow's Bar Dam. The said Widow's Bar Dam was built by the United States across the bed or channel of the Tennessee River to a height sufficient to raise the stage of the river at the dam at all seasons from ten to twenty feet. This dam was completed by the United States in October, 1925, and is a permanent work of internal improvement, permanently damming up and raising the level of the water in the river from ten to twenty feet, as stated. The effect of this dam was to back up the water in the channel of the river and out over adjacent lands along the channel of the river up to and above the farm owned by your petitioner, above described, which is situated several miles up the river Northward and above the location of said dam. The water in the channel of the Tennessee River and in said Jones Creek oposite the said farm of your petitioner is raised by the said Widow's Bar Dam about six feet above the natural level and flow of the river and creek, which existed previous to the construction of said dam. This causes the water of the said Tennessee River to be kept back and to flow back, and to be raised and elevated above the natural height of the said river along its natural bed, and causes the same to flow out upon and over the land of your petitioner and to stand thereon continuously in the swags, lagoons and low places.

The said farm of your petitioner, above described, is low land, commonly known as Tennessee River bottom land, being very rich, alluvial soil, and under natural conditions was capable of cultivation and the production of valuable crops each year. By reason of the construction [fol. 6] of said Widow's Bar Dam by the United States government and the constant backing up and flow of the water upon and over the land of your petitioner, a substantial part of your petitioner's land is permanently overflowed and destroyed for farming purposes.

Moreover, the Tennessee River at the point where it flows by your petitioner's said farm is approximately one-half mile in width, and down to that point serves to drain East Tennessee, Western North Carolina and Southern Virginia. Over this large water-shed heavy rains are frequent, causing constant fluctuation in the flow of the water and in the spread of the river along and opposite to the said farm of your petitioner.

Previous to the construction of the said Widow's Bar Dam by the government of the United States, the natural fluctutaion in the spread and flow of the river caused by the rains over the water-shed drained by said river did no damage to your petitioner's said farm, and the crops planted thereon, because the heaviest rains throughout the said water-shed causing a substantial rise in said river occurred during the fall, winter and early spring months, and not during the planting and growing season of the crop year. During such times if the river should overflow its banks and spread over the lands of your petitioner, it did not destroy any crops. Moreover, the channel and flower of the river being unobstructed, the waters flowed off so rapidly that the tide of the river soon passed and the waters receded from the lands of your petitioner. The rains which occurred during the summer and during the planting and growing season for the cultivation of crops on said farm rarely raised the river sufficient to [fol. 7] cause the same to back out over any substantial part of your petitioner's said farm. If such rains did occur, so that some part of the farm became overflowed during the planting season, the channel of the river being unobstructed, the tide soon passed and the water of the river receded to its normal flow before damage was done

to your petitioner's said farm and to the crops planted and growing thereon.

Your petitioner would now show that since the construction, completion and maintenance of the said Widow's Bar Dam by the government of the United States in October, 1925, the waters of the river are not only held continuously by the dam over a large part of your petitioner's said land, but the frequent recurring rise in said river, incident to heavy rains throughout the water-shed drained by said river, causes a much higher rise and higher crest of the flood waters upon said river and cause the frequent rises in the river to overflow petitioner's said lands, which previously had not spread over petitioner's said land at all; or, if they were high enough to spread over the same, they had receded so as to do no damage.

But now since the construction of the dam, the waters from said river spread over petitioner's said farm to a much larger extent and remain thereon for a much longer period of time, so that a large part of your petitioner's very best and most productive land, approximating two hundred and twenty-five acres, is taken and destroyed so that your petitioner is unable to cultivate the same or to realize any return therefrom.

[fol. 8] This amount of land, approximating two hundred and twenty-five acres, so taken and destroyed, as above charged, is not in a solid body or uniform shape, but extends over from and across petitioner's said farm in different directions along the lagoons, ditches and low places, so that your petitioner is unable to reach other parts of the farm to cultivate same or to gather and harvest the crops therefrom. In order to avoid the entire loss and destruction of the usable value of these other parts of said farm by reason of these bogs, lagoons and swamps created by backing up the waters of the river in manner as aforesaid, it will be necessary for petitioner to construct, erect and continuously maintain dikes, causeways, bridges or crossings over said bogs, lagoons and swamps at large expense. Even with such causeways, bridges or crossings constructed, erected and maintained, the usable value of your petitioner's said remaining land will be largely taken and destroyed on account of the time, delay and expense in crossing said bogs, lagoons and swamps and reaching the isolated parts of said farm caused

by the construction, erection and maintenance of said Widow's Bar Dam by the government of the United States.

5th. Your petitioner further shows that the said acts of the government of the United States, as aforesaid, in constructing, erecting, maintaining and operating said Widow's Bar Dam, and in flowing the water of the Tennessee River upon and over the land of your petitioner in manner as aforesaid has been lawfully done by the officers and agents of the United States, under the authority of the United States in the exercise of its powers of emi- [fol. 9] nent domain and the regulation of commerce between the States, and in the improvement of navigation for that purpose along the Tennessee River as one of the channels and highways of commerce between the States.

6th. Neither the government of the United States or any officer or agent thereof, has at any time set up claim of title for right of flowage upon and over the lands of your petitioner. On the contrary, the engineers, agents and representatives of the United States, pursuant to the Acts of Congress and the order of the War Department, have made surveys upon your petitioner's said farm to ascertain the amount, extent and value of the property of your petitioner's which has been taken and appropriated by the government of the United States in the construction maintenance and operation of its said Widow's Bar Dam and have made an assessment of the value and made an offer to your petitioner, which was by your petitioner deemed inadequate and unjust compensation for the property taken. Accordingly, your petitioner declined to accept the amount offered and brings this suit to have his rights in the premises adjudged by this Court and to have judgment entered herein against the United States for the amount of his said claim.

7th. Petitioner would now show that the reasonable value of his property so taken and appropriated by the government of the United States, as above set forth, and the damages suffered by him on account of such appropriation, is the sum of $10,000.00, for which he sues herein.

[fol. 10] Premises considered, petitioner prays;

That this petition be filed by the Clerk of this Court; that copies thereof be duly certified by the Clerk for serv-

ice upon the United States District Attorney for the Northern District of Alabama and for forwarding by registered mail to the Attorney General of the United States at Washington, D. C.; that affidavit of such service be made and filed in this Court on behalf of your petitioner.

Let the District Attorney be required within the time required by law to make defense to this petition. Otherwise, let same be taken for confessed. Let the Court ascertain the amount of your petitioner's damage, file his written opinion setting forth the specific findings of fact and conclusion of law involved in the cause, and render judgment thereon in favor of your petitioner against the United States for the amount of his damages, to-wit: $10,000.00, which shall include interest from the time of the taking, to-wit: October, 1925, and for the costs of this cause.

Grant general relief.

E. P. Jacobs, Petitioner. Chas. C. Moore, Alan S. Kelly, Attorneys for Petitioner.

[fol. 11] *Duly sworn to by E. P. Jacobs. Jurat omitted in printing.*

[fol. 12] IN UNITED STATES DISTRICT COURT, NORTHEASTERN DIVISION, NORTHERN DISTRICT OF ALABAMA

AUGUSTUS A. GUNTER, Executor of the Last Will of Mrs. S. B. Gunter, Deceased, Plaintiff,

vs.

UNITED STATES, Defendant

PETITION—Filed Sept. 20, 1928

To the Honorable William I. Grubb, United States District Judge for the Northern District of Alabama:

Petitioner respectfully represents:

1st. That his full name is Augustus A. Gunter, and that his testator, Mrs. S. B. Gunter, at the time of her death, to-wit: 10 day of July, 1928, and for many years heretofore, had been a resident and citizen of Bridgeport, in Jackson County, Alabama, within the Northeastern Di-

vision of the Northern District of Alabama, and within the territorial jurisdiction of this Court.

The last will and testament of Mrs. S. B. Gunter, which appointed petitioner, was duly probated in the Probate Court of Jackson County, Alabama, on the 16 day of August, 1928, and your petitioner was duly appointed and qualified as executor of said will, and as such is vested with the right of action hereinafter stated.

[fol. 13] 2nd. Your petitioner as such executor has a claim against the United States under an implied contract, for compensation for value of property taken by the United States for public use, as hereinafter more particularly stated.

3. In October, 1925, and before and after that time your petitioner testator was, and still was at the time of her death, the owner of a farm lying along the West bank of the Tennessee River, situated in Jackson County, Alabama, and described as follows:

Bounded on the North by the lands of Cook and Kelly; on the East by Tennessee River; on the South by Troxell, and on the West by Jacobs and Whitcher, containing 103 acres, more or less.

4th. Petitioner further shows that for several years before and after October, 1925, the government of the United States has been and still is in the exercise of its power of eminent domain under the Constitution of the United States, and by authority of the Acts of Congress, duly empowering its officers and agents thereto, engaged, among other things, in the work of improving navigation on the Tennessee River along its course, through the State of Tennessee, and through the State of Alabama. This work has been and is being accomplished by the erection, construction, maintenance and operation of dams, locks and other structures in the bed of the said river and across the channel thereof at strategic locations along the course of said river, designed to obstruct the flow of the current of said river and to dam up and hold the waters of the same so as to deepen the channel, and thereby provide water of [fol. 14] sufficient depth throughout the year to facilitate navigation upon said river.

Among other works of internal improvement undertaken and carried to completion by the United States, pursuant to the authority of the Constitution and Acts of Congress, above referred to, was and is the construction, maintenance and operation of a dam across the bed or channel of the Tennessee River in Jackson County, Alabama, a few miles South of the Tennessee State line at a location known as Widow's Bar, which dam is known and designated in the Engineer's Office of the War Department of the United States as Widow's Bar Dam. The said Widow's Bar Dam was built by the United States across the bed or channel of the Tennessee River to a height sufficient to raise the stage of the river at the dam at all seasons from ten to twenty feet. This dam was completed by the United States in October, 1925, and is a permanent work of internal improvement, permanently damming up and raising the level of the water in the river from ten to twenty feet, as stated. The effect of this dam was to back up the water in the channel of the river and out over adjacent lands along the channel of the river up to and above the farm owned by your petitioner testator, above described, which is situated several miles up the river Northward and above the location of said dam. The water in the channel of the Tennessee River opposite the said farm is raised by the said Widow's Bar Dam about six feet above the natural level and flow of the river which existed previous to the construction of said dam. This causes the water of the said Tennessee River to be kept back and to flow back, and to be raised [fol. 15] and elevated above the natural height of the said river along its natural bed, and causes the same to flow out upon and over the land of your petitioner and to stand thereon continuously in the swags, lagoons and low places.

The said farm above described is low land, commonly known as Tennessee River bottom land, being very rich, alluvial soil, and under natural conditions was capable of cultivation and the production of valuable crops each year. By reason of the construction of said Widow's Bar Dam by the United States government and the constant backing up and flow of the water upon and over the land of your petitioner, testator a substantial part of your petitioner's land is permanently overflowed and destroyed for farming purposes.

Moreover, the Tennessee River at the point where it flows by said farm is approximately one-half mile in width, and down to that point serves to drain East Tennessee, Western North Carolina and Southern Virginia. Over this large water-shed heavy rains are frequent, causing constant fluctuation in the flow of the water and in the spread of the river along and opposite to the said farm of your petitioner.

Previous to the construction of the said Widow's Bar Dam by the government of the United States, the natural fluctuation in the spread and flow of the river caused by the rains over the water-shed drained by said river did no damage to said farm and the crops planted thereon, because the heaviest rains throughout the said water-shed causing a substantial rise in said river occurred during [fol. 16] the fall, winter and early spring months, and not during the planting and growing season of the crop year. During such times if the river should overflow its banks and spread over the said lands, it did not destroy any crops. Moreover, the channel and flow of the river being unobstructed, the waters flowed off so rapidly that the tide of the river soon passed and the waters receded from the lands of your petitioners testator. The rains which occurred during the summer and during the planting and growing season for the cultivation of crops on said farm rarely raised the river sufficient to cause the same to back out over any substantial part of said farm. If such rains did occur, so that some part of the farm became overflowed during the planting season, the channel of the river being unobstructed, the tide soon passed and the water of the river receded to its normal flow before damage was done to said farm and to the crops planted and growing thereon.

Your petitioner would now show that since the construction, completion and maintenance of the said Widow's Bar Dam by the government of the United States in October, 1925, the waters of the river are not only held continuously by the dam over a large part of said land, but the frequent recurring rise in said river, incident to heavy rains throughout the water-shed drained by said river, causes a much higher crest of the flood waters upon said river and causes the frequent rises in the river to overflow said lands,

which previously had not spread over said land at all; or, if they were high enough to spread over the same, they had receded so as to do no damage.

[fol. 17] But now since the construction of the dam, the waters from said river spread over said farm to a much larger extent and remain thereon for a much longer period of time, so that a large part of the very best and most productive land, approximating sixty-five acres, is taken and destroyed so that the owner will permanently be unable to cultivate the same or to realize any return therefrom.

This amount of land, approximating sixty-five acres, so taken and destroyed, as above charged, is not in a solid body or uniform shape, but extends over from and across said farm in different directions along the lagoons, ditches and low places, so that the owner is unable to reach other parts of the farm to cultivate same or to gather and harvest the crops therefrom. In order to avaid the entire loss and destruction of the usable value of these other parts of said farm by reason of these bogs, lagoons and swamps created by backing up the waters of the river in manner as aforesaid, it will be necessary to construct, erect and continuously maintain dikes, causeways, bridges or crossings over said bogs, lagoons and swamps at large expense. Even with such causeways, bridges or crossings constructed, erected and maintained, the usable value of said remaining land will be largely taken and destroyed on account of the time, delay and expense in crossing said bogs, lagoons and swamps and reaching the isolated parts of said farm caused by the construction, erection and maintenance of said Widow's Bar Dam by the government of the United States.

5th. Your petitioner further shows that the said acts of the government of the United States, as aforesaid, in con-
[fol. 18] structing, erecting, maintaining and operating said Widow's Bar Dam, and in flowing the water of the Tennessee River upon and over the land of your petitioners testator in manner as aforesaid has been lawfully done by the officers and agents of the United States, under the authority of the United States in the exercise of its powers of eminent domain and the regulation of commerce between the States, and in the improvement of navigation for that

purpose along the Tennessee River as one of the channels and highways of commerce between the States.

6th. Neither the government of the United States, or any officer or agent thereof, has at any time set up claim of title for right of flowage upon and over the land of your petitioners testator. On the contrary, the engineers, agents and representatives of the United States, pursuant to the acts of Congress and the order of the War Department, have made surveys upon said farm to ascertain the amount, extent and value of the property which has been taken and appropriated by the government of the United States in the construction, maintenance and operation of its said Widow's Bar Dam and have made an assessment of the value and made an offer to your petitioner's testator, which was deemed inadequate and unjust compensation for the property taken. Accordingly, your petitioner's testator declined to accept the amount offered and brings this suit to have his rights in the premises adjudged by this Court and to have judgment entered herein against the United States for the amount of his said claim.

[fol. 19] 7th. Petitioner would now show that the reasonable value of the property so taken and appropriated by the government of the United States, as above set forth, and the damages suffered by petitioners testator on account of such appropriation, is the sum of $9,500.00, for which he sues herein.

Premises considered, petitioner prays:

That this petition be filed by the Clerk of this Court; that copies thereof be duly certified by the Clerk for service upon the United States District Attorney for the Northern District of Alabama and for forwarding by registered mail to the Attorney General of the United States at Washington, D. C.; that affidavit of such service may be made and filed in this Court on behalf of your petitioner.

Let the District Attorney be required within the time required by law to make defense to this petition. Otherwise, let same be taken for confessed. Let the Court ascertain the amount of your petitioner's damage, file his written opinion setting forth the specific findings of fact and conclusion of law involved in the cause, and render judgment

thereon in favor of your petitioner against the United States for the amount of his claim, to-wit: $9,500.00, which shall include interest from the time of the taking, to-wit: October, 1925, and for the costs of this cause.

[fol. 20] Grant general relief.

Augustus A. Gunter, Petitioner. Alan S. Kelly, Chas. C. Moore, Attorneys for Petitioner.

Duly sworn to by Augustus A. Gunter. Jurat omitted in printing.

[fol. 21] IN UNITED STATES DISTRICT COURT

No. 2031. At Law

A. A. GUNTER, Ex., etc.,

v.

UNITED STATES

ORDER ALLOWING AMENDMENT TO PETITION—Filed Oct. 4, 1929

In this case, comes Augustus A. Gunter, individually and Mrs. Francis G. Boys, and ask leave to join as parties Plaintiff, and say that they are the children and only devisees under the will of Mrs. S. B. Gunter, deceased, and as such take title to the land described in the petition in this cause, and join herein that the present owners of the legal title may be before the Court.

It is accordingly ordered that said parties may intervene and become parties Plaintiff and that the petition be amended to show that they are holders of the legal title to the land described in the Petition.

IN UNITED STATES DISTRICT COURT

E. P. JACOBS, Plaintiff,

vs.

UNITED STATES, Defendant

ANSWER OF DEFENDANT—Filed Oct. 5, 1928

Answer to Petition

Comes the defendant, the United States of America by its Attorney, C. B. Kennamer, United States Attorney for

[fol. 22] the Northern District of Alabama, and for answer to the petition filed by the plaintiff against the defendant on August 13, 1928, says:

That the defendant denies the allegations of the said petition in toto as set out in sections 1, 2, 3, 4, 5, 6 and 7 thereof.

C. B. Kennamer, Untied States Attorney. R. M. Sims, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

AUGUSTUS A. GUNTER, Executor of the Last Will of Mrs. S. B. Gunter, Deceased, Plaintiff,

vs.

UNITED STATES, Defendant

ANSWER OF DEFENDANT—Filed Oct. 23, 1928

Comes the defendant, the United States of America, in the above styled cause, by its attorney, C. B. Kennamer, United States Attorney for the Northern District of Alabama, and for answer to the original petition filed by the [fol. 23] plaintiff and against the defendant in said cause, says:

That the defendant denies the allegations in toto of said petition as set out in Sections 1, 2, 3, 4, 5, 6 and 7 thereof.

C. B. Kennamer, United States Attorney. R. M. Sims, Assistant United States Attorney.

MANDATE U. S. CIRCUIT COURT OF APPEALS—Filed March 11, 1931

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The President of the United States of America to the Honorable the Judge of the District Court of the United States for the Northern District of Alabama, Greeting:

Whereas lately, in the District Court of the United States for the Northern District of Alabama, before you, in a cause between E. P. Jacobs, plaintiff, and United States of America, defendant, No. 323, at Law, wherein the judgment of the said District Court entered in said cause on the 21st day of January, A. D. 1930, was in favor of said defendant [fol. 24] and against, E. P. Jacobs, plaintiff, as by the in-

spection of the transcript of record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Fifth Circuit, by virtue of an appeal sued out by E. P. Jacobs agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October in the year of our Lord one thousand nine hundred and thirty, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

November 28th, 1930.

You, therefore, are hereby commanded that such execution and further procedings be had in said cause as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, the Tenth day of March, in [fol. 25] the year of our Lord one thousand nine hundred and thirty-one.

Oakley F. Dodd, Clerk U. S. Circuit Court of Appeals for the Fifth Circuit.

IN UNITED STATES DISTRICT COURT

No. —

E. P. JACOBS

vs.

THE UNITED STATES

Damage Suit under the Tucker Act

ORDER ON MANDATE—Filed Oct. 6, 1931

A judgment and decree of this Court having been entered herein on the 21st day of January, 1930, in favor of

the defendant, dismissing plaintiff's petition or cause of action, and taxing petitioner with the court costs, and the plaintiff or petitioner having duly prosecuted its appeal from said judgment or decree to the United States Circuit Court of Appeals for the Fifth Circuit, and said Circuit Court of Appeals having rendered its decree reversing the judgment of this Court rendered on the 21st day of January, 1930, and remanding the cause, and having duly issued its mandate bearing date of March 10, 1931, so reversing [fol. 26] said judgment, and remanding the cause to this Court for such proceeding as according to right, justice and the law of the United States are to be had, and in accordance with said mandate, and said mandate being now before the Court, and presented herein:

Now, on motion of Chas. C. Moore, Attorney for the petitioner or plaintiff, it is hereby ordered, adjudged and decreed, that the mandate of the United States Circuit Court of Appeals of the Fifth Circuit be filed herein, and the same hereby is made the order of this Court.

It is further ordered, adjudged and decreed that the said decree and judgment rendered by this Court on the 21st day of January, 1930, be and the same is hereby set aside.

This October 6, 1931.

W. I. Grubb, United States District Judge.

O. K.

—— ——, Attorney for Petitioner. —— ——, Assistant United States Attorney, for Defendant.

[fol. 27] In United States District Court

Motion for New Trial—Filed Feb. 7, 1930

In these consolidated cases come Plaintiffs, E. P. Jacobs and Augustus A. Gunter, Executor, and move for new trial and, for grounds of motion, say:

I

The District Judge erred in holding that the damage to Plaintiffs' lands, resulting from the construction of the Widow's Bar Dam across the Tennessee River by Defendant, was tortious in its nature, for which no recovery could be had in these suits, because:

(a) The said damage was the necessary result of the building of the Dam which Defendant is presumed to anticipate and intend to pay for.

(b) Defendant's engineers had made surveys, determining the fact of flowage damage to the farms of Plaintiffs, and others, in like situation, and reported this fact to Congress before the Acts were passed authorizing the construction of this Widow's Bar Dam, and the Dam was authorized by Congress, and constructed with the intention, both on the part of Congress and the engineers of the War [fol. 28] Department in charge of construction, to pay for this flowage damage.

(c) The determination by the Board of Engineers of the United States that flowage damage would result to the farms of Plaintiffs and others in like situation, and the provisions of the Act of Congress for this damage to be paid by the United States, is conclusive on the Court in these cases, that this flowage damage is recoverable in these cases.

(d) After the Widow's Bar Dam was built, the Board of Engineers of the War Department causes surveys to be made of Plaintiff's lands, determining that 115.2 acres of the farm of Plaintiff, E. P. Jacobs, and 34.59 acres of the farm of A. Gunter's Testate, were directly damaged by overflow water from the Tennessee River, as a result of the building of this Dam, and offers were made by the Defendant to pay the damage as estimated by them. This was a construction of the law as applied to the facts of these cases by the officers charged with the execution of the law and should be followed by the Court, because not clearly shown to be erroneous.

II

The District Judge erred in holding that Plaintiffs cannot recover in these cases since their lands were not continuously overflowed by back-water from the Tennessee River, held by the Widow's Bar Dam, because an easement for flowage by intermittent but inevitably recurring floods which occur every year on the Tennessee River, is property [fol. 29] for which compensation must be paid under the Fifth Amendment and the Acts of Congress.

III

The District Judge erred in holding that Plaintiffs could not recover anything in these cases because the value of their lands was not totally destroyed. This was error because the taking of any interest in their land is the taking of property under the Fifth Amendment, and the law has authorized the taking of easements in law, as well as the fee and provides for payment to the extent taken.

IV

The District Judge erred in construing the decision of United States vs. Cress, 243rd U. S. 316, to hold that recovery could be had "only as to land which had not been affected by overflow, prior to the building of the structure", and holding Plaintiffs could not recover for the increased frequency, height and duration of floods over their lands, caused by the Widow's Bar Dam and which destroy two thirds of its value, because this Dam obstructed the natural flow of the River and caused its waters to back out over the lands of Plaintiffs, which would not have done so except for the Dam. The natural drainage area of the Tennessee River, above Widow's Bar Dam, is about twenty-five thousand square miles. Before the Dam was built, the rains which occurred during the crop season over this drainage area did not cause the River to back out over the lands of Plaintiffs often. When they did overflow Plain- [fol. 30] tiff's lands, they soon receded so that small damage was done. Since the Dam was built, and by reason of the obstruction of the Dam, each 20,000 second-feet rise is three and one-half feet higher and remains from one to two days longer than it would without the Dam. It is these frequent small rises in the River which destroy the value of Plaintiffs' lands. The fact that Plaintiffs' lands are sometimes submerged by flood water does not make them part of the River channel nor give the United States the right to increase the servitude for flowage without liability.

The foregoing motion for new trial being considered by the Court is taken under advisement and continued from term to term until the case of Jacobs vs. U. S. is decided by the Court of Appeals, and then to be ruled on according

to the decision in that case as per stipulation of parties on file.

W. I. Grubb, Judge.

[fol. 31] IN UNITED STATES DISTRICT COURT

Number —

AUGUSTUS A. GUNTER, Executor, et al.

vs.

THE UNITED STATES

Damage Suit, under the Tucker Act

JUDGMENT ON MOTION FOR NEW TRIAL—Filed Oct. 6, 1931

In this cause, it appears that a stipulation was made and filed, signed by the attorneys for the parties, agreeing that the motion for a new trial in this cause should stand continued from term to term until the United States Circuit Court of Appeals for the Fifth Circuit should decide the case of E. P. Jacobs vs. The United States, involving the same questions, and that whatever judgment is directed by the said Court of Appeals in said case, the same to govern and control in this case as to the Court's ruling on the motion for a new trial; and

It appearing from the mandate and opinion of the United States Circuit Court of Appeals of the Fifth Circuit to this Court in said case of E. P. Jacobs vs. The United States, that the judgment entered therein by this Court at a former term is reversed, and the cause remanded, with directions granting a new trial in the case:

[fol. 32] It is, therefore, ordered and adjudged that the motion for a new trial in this cause be and the same is hereby granted, and a new trial is awarded, and the cause is restored to the docket of this Court for such purpose.

This October 6, 1931.

W. I. Grubb, United States District Judge.

In United States District Court

No. 323 and No. 2031

E. P. Jacobs

vs.

The United States

and

Augustus A. Gunter, Executor, et al.

vs.

The United States

Order Consolidating Cases—Filed Oct. 6, 1931

On Motion of the Plaintiffs, it is ordered that the above styled cases, being of like nature, be consolidated and heard together as one case, and that the evidence in each [fol. 33] be considered in both, so far as relevant, and that, in event of appeal, only one record need be made and taken to the Circuit Court of Appeals.

This order was made October 4th, 1929, and is entered now for then.

W. I. Grubb, District Judge.

In United States District Court, at Huntsville, Alabama

No. 323 and No. 2031

E. P. Jacobs

vs.

The United States

and

Augustus Gunter, Executor, et al.

vs.

The United States

Final Judgment—Filed October 15, 1931

Be it remembered that the above styled cases were heard before the Honorable Wm. I. Grubb, Judge, on October 6th and 7th, 1931, upon the pleadings, mandate from the Court

[fol. 34] of Appeals in case No. 323, stipulation of facts and testimony of witnesses, from all of which the Court has made and filed his findings of fact and conclusions of law as a part of the record of said consolidated cases.

It is accordingly ordered and adjudged that E. P. Jacobs, plaintiff in case No. 323, have and recover of the United States the sum of $2,919.00 as of October 1st, 1925, together with interest thereon from said date at the rate of 6%, amounting to $1054.28, making a total of $3973.28 due at this time as compensation for the taking of the right of flowage by the United States for the improvement of navigation on the Tennessee River of 115.2 acres of said farm, lying between contours 592 and 599 above the Widow's Bar Datum, said farm being described as follows, to-wit:

Situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Gunter, Tucker and McCampbell; on the east by Mrs. Gunter; on the south by Whitcher, Rice and Jones Creek, and on the West by McCampbell, containing 417 acres, more or less.

It is further ordered and adjudged that said plaintiff, E. P. Jacobs, recover of the United States all of the costs incurred in said case No. 323, including the costs of the appeal to the Circuit Court of Appeals for the Fifth Circuit and the remand to this Court, such costs, however, not to exceed that allowed by law under Section 152, Judicial Code.

[fol. 35] Upon the payment of said judgment, the United States shall be vested with title to said easement of flowage necessary and incident to the erection, maintenance and operation of said Dam, as completed October 1st, 1925.

It is also ordered and adjudged that Augustus Gunter, Executor, and Mrs. Frances Boyd, plaintiff in case No. 2031, have and recover of the United States the sum of $1,030.00 as of October 1st, 1925 together with interest thereon from said date at the rate of 6%, amounting to $372.00, making a total of $1402.00 due at this time as compensation for the taking of the right of flowage by the United States for the improvement of navigation on the Tennessee River of 34.59 acres of said farm, lying between contours 592 and 599 above the Widow's Bar Datum, said farm being described as follows, to-wit:

Situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Cook and Kelly; on the east by Tennessee River; on the south by Troxell, and on the west by Jacobs and Whitcher, containing 103 acres, more or less.

It is further ordered and adjudged that said plaintiffs, Augustus Gunter, Executor, and Mrs. Frances Boyd, recover of the United States all of the costs incurred in said case No. 2031, such costs, however, not to exceed that allowed by law under Section 152 of the Judicial Code.

Upon the payment of said judgment, the United States shall be vested with title to said easement of flowage neces-
[fol. 36] sary and incident to the erection, maintenance and operation of said Dam, as completed October 1st, 1925.

To which judgments rendered aforesaid by the Court the defendant excepts.

Enter.

W. I. Grubb, Judge.

IN UNITED STATES DISTRICT COURT

No. 323 and No. 2031

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Oct. 15, 1931

These consolidated cases were tried on October 6th and 7th, 1931, when the following stipulations of fact were en-
[fol. 37] tered into by the parties and, by agreement, are made part of the findings of fact in these cases, to-wit:

Comes the parties in the above entitled cases, and agree that the following constitute certain facts therein:

(1) That the plaintiffs in both cases at the time of the bringing of these suits were resident citizens of Jackson County, Alabama.

(2) That the plaintiff, E. P. Jacobs in Case No. 323, in 1923, was at that time, and prior thereto, the owner of a

farm, lying along Jones Creek, a tributary of the Tennessee River, situated in Jackson County, Alabama, and described as follows, to-wit:

Bounded on the north by the lands of Gunter, Tucker and McCampbell; on the east by Mrs. Gunter; on the south by Whitcher, Rice and Jones Creek, and on the west by McCampbell, containing 417 acres, more or less.

That the plaintiffs in the Gunter case No. 2031, in 1923, and prior thereto, were the owners of a farm, lying along Jones Creek, a tributary of the Tennessee River, situated in Jackson County, Alabama, and described as follows:

Bounded on the North by the lands of Cook and Kelly; on the East by Tennessee River; on the South by Troxell, and on the West by Jacobs and Whitcher, containing 103 acres, more or less.

(3) That, for several years before and after October, 1925, the defendant, United States, has been and is still in the exercise of its power of eminent domain under the [fol. 38] constitution of the United States, and by authority of the Acts of Congress, duly empowering its officers and agents thereto, engaged, among other things, in the work of improving the navigation of the Tennessee River along its course, through the states of Alabama and Tennessee, which work has been and is being accomplished by the erection, construction, operation, and maintenance of locks and dams, and other structures, in the bed of said river, across the channel thereof at strategic locations along the course of said river, thereby to provide water of sufficient depth throughout the year to facilitate navigation thereon.

(4) That the defendant, in the prosecution of such work, in accordance with the recommendations of its Board of Engineers and the Acts of Congress, passed pursuant to such recommendations, constructed a crib dam out of 10 inch square timbers bolted together and filled with rock, with a concrete apron across the bed or channel of the Tennessee River, in Jackson County, Alabama, at a location known as "Widow's Bar", located down the river about eight (8) miles below the Plaintiffs' farms and the mouth of Jones Creek, which Dam was completed October 1st, 1925.

(5) That the said Widow's Bar Dam was designed to raise the river at extreme low water at the dam about 11 feet, so as to back up the water in the river to Hale's Bar Dam, located about twenty-six (26) miles up the river from Widow's Bar Dam, raising water at Hale's Bar at extreme low water one foot, deepening the channel and forming a canal for navigation at all seasons. This Widow's Bar Dam would not cause the river to overflow the banks [fol. 39] of the river or its tributaries at low water and permanently submerge any lands, but would increase the height of intermittent rises in the river up to a volume of 150,000 ft. per second. Intermittent rises occur in the Tennesse River every year, principally the winter and early spring months.

This Widow's Bar Dam raises the level of the water in the river at extreme low water about 11 ft. at the dam, and, at a flow of 20,000 cu. ft. per second, it raises the water in the river 9.2 feet at the dam. None of the lands of either of the Plaintiffs is overflowed by the water from the river until the flow exceeds 75,000 cu. ft. per second. At the flow of 20,000 cu. ft. per second, the effect of the Dam was to raise the water in the Tennessee River at the mouth of Jones Creek, opposite the farms of the plaintiffs 3.5 ft. At this flow, the elevation of the water surface at the mouth of Jones Creek, before the Dam was built, was 585 ft.; afterwards 588.5 ft. The difference in the water levels before and after the construction of the Dam decreases now as the river rises and becomes of a greater flow at the mouth of Jones Creek, as follows:

20,000 foot flow before 585 ft., afterwards 588.5 ft. dif. 3½ ft.

50,000 foot flow before 589 ft., afterwards 591 ft. dif. 2 ft.

75,000 foot flow before 592 ft., afterwards 593.3 ft. dif. 1.3 ft.

111,500 foot flow before 595.5 ft., afterwards 596.6 ft. dif. 1.1 ft.

[fol. 40] 145,000 foot flow before 598 ft., afterwards 598.5 ft. dif. .5 ft.

150,000 foot flow before 599 ft., afterwards 599 ft. No difference.

That, at a flow of 150,000 cu. ft. per second, the effects of the dam disappear and play out, and that no lands lying above the elevation 599 ft., that were subject to overflow by the river prior to construction of the Dam, could be attributed to the construction, operation and maintenance of said Dam.

(6) The main channel of the Tennessee River above Widow's Bar Dam, has well-defined earth banks, rising to an elevation of 610 feet at the mouth of Sequatchie River, some distance above the mouth of Jones Creek, except where cut into by tributaries. That the effects of the dam play out long before the surface elevation of these river banks immediately above and below the mouth of Jones Creek are reached.

(7) That after completion of the Dam, complaint of damages were made by different land owners above the Dam, and thereupon, the defendant, the United States, caused a survey to be made of the land above Widow's Bar Dam during the summer and fall of 1928 to ascertain what lands, if any, above the Dam might have been damaged by reason of the building of the Dam, including farms of the plaintiffs in both of these suits. This survey was made by running contours at intervals of two feet elevation above the Widow's Bar Datum and calculating back water curves at various volumes of second feet flow in the river, ranging from 20,000 to 150,000 feet per second. Typographical [fol. 41] maps of this survey made by the Engineers of the United States Army show a portion of the lands of both farms to be affected on account of the construction of the said dam producing increase in the occasional overflows of said land, the result of the survey showing 115.2 acres, more or less, of the farm of E. P. Jacobs being so affected; and 34.59 acres of the Gunter farm being so affected, these acreages being found to lie between elevations 592 and 599. That pursuant to authority from the Chief Engineer of the War Department, the District Engineer's Office of the United States at Florence, Alabama, wrote a letter to each land owner thought to be affected, including these plaintiffs, the one to plaintiff, E. P. Jacobs being as follows:

September 29, 1927.

"800, 222-WB.
Purchase of flowage rights.

Mr. E. P. Jacobs, Bridgeport, Ala.

DEAR SIR: This office has had under investigation for some time the effect of the construction of Widow's Bar Dam on the value of land adjacent to the pool formed by said dam. This investigation has now been concluded and it is found that part of your land lying below 599 contour, which is 14 feet higher than the crest of the dam, is subject to overflow more frequently than before the dam was constructed.

The government, therefore, desires to purchase from you the right to overflow that portion of your land lying below the 599 foot contour, the upper limit of flood damage which can be attributed to the construction of the dam. The area of this portion is 115.2 acres, more or less, and the Chief of [fol. 42] Engineers has agreed to recommend payment of the sum of $1,082.31 for the easement of flowage on this property, subject to establishment of valid title.

Please advise me at your earliest convenience whether you are willing to accept this amount in payment of the right to overflow your land. If you will accept the amount, the necessary abstract and conveyance will be prepared as soon as practicable, free of cost to you. If an examination of your title shows that same is defective the War Department will cause condemnation proceedings to be instituted provided the amount of the award is agreed upon in advance.

In the event you are unwilling to accept the settlement offered, you may have recourse to the courts for relief, suing either in the local United States District Court or in the Court of Claims.

Yours very truly, Hugh P. Oram, Captain, Corps of Engineers, District Engineers."

The contents of the letter to plaintiff, Augustus A. Gunter, Executor, was exactly the same, except it stated that the acreage of the land affected was 34.59 acres, and that the amount recommended to — paid for an easement of flowage thereto was $473.54.

That the construction of said dam was provided for in the improvement of the Tennessee River between Chattanooga and Brown's Island, which provides for the construction of Widow's Bar Lock and Dam and Belle Fonte Island Lock and Dam, together with certain other improvements, being adopted in River and Harbor Act of July 27, 1917, subject [fol. 43] to the condition that "local interests shall assume and pay all claims for flowage damage or arrange to do so in a manner satisfactorily to the Secretary of War". The estimated cost of flowage damages for both dams was stated to be $22,000.00. In the River and Harbor Act of March 2, 1919, Congress waived the condition of local interests bearing or paying the claims of flowage damage, so that it became a charge against the United States.

It is hereby stipulated that the foregoing constitute facts in these cases for the trial thereof, and that so far as they go, the Court may make them its findings of fact in the trial of the cases.

It is further agreed that both cases be consolidated, and heard together, and one finding of facts made, and one judgment rendered for both causes.

The Court further finds from the evidence that the farm of E. P. Jacobs, containing 417 acres, described in case No. 323, was worth on October 1st, 1925, $50.00 per acre and was damaged as a whole by the reason of the taking by the United States under the 5th Amendment to the Constitution on October 1st, 1925, of an easement of flowage over 115.2 acres thereof, by the construction of the Widow's Bar Dam in the Tennessee River, to the amount of $7.00 per acre, making a total damage of $2,919.00.

The Court finds from the evidence that the farm of Augustus Gunter, Executor, et al., containing 103 acres, described in case No. 2031, was worth on October 1st, 1925, $75.00 per acre and was damaged as a whole by reason of [fol. 44] the taking by the United States under the 5th Amendment to the Constitution on October 1st, 1925, of an easement of flowage over 34.59 acres thereof by the construction of the Widow's Bar Dam in the Tennessee River, to the amount of $10.00 per acre, making a total damage of $1,030.00 to said farm.

The Court is of opinion that plaintiff, E. P. Jacobs, in case No. 323, is entitled to recover as just compensation for the taking of his said property by the United States for said

public improvement the said sum of $2,919.00 as of October 1st, 1925, together with interest thereon at the rate of 6% from that date until now as just compensation under the 5th Amendment to the Constitution of the United States.

The Court is also of opinion that Augustus Gunter, Executor, and Mrs. Frances Boyd, plaintiffs in case No. 2031, are entitled to recover from the United States the said sum of $1,030.00 as compensation for the taking of their said property by the United States for said work of public improvement, as of October 1st, 1925, together with interest thereon at 6% from the date of said taking until now as just compensation under the 5th Amendment to the Constitution of the United States.

The Court is further of the opinion that the plaintiffs in each of the above styled cases are entitled to recover against the United States all of the costs of said respective cases, but such costs not to exceed that provided for under Section 152 of the Judicial Code. To which findings of facts (except those agreed to as set out) the defendant excepts. [fols. 45–140] This October 15th, 1931.

W. I. Grubb, Judge.

IN UNITED STATES DISTRICT COURT

No. 323. At Law

E. P. JACOBS

vs.

UNITED STATES OF AMERICA

and

No. 2031. At Law

AUGUSTUS GUNTER, Executor, et al.

vs.

UNITED STATES OF AMERICA

Bill of Exceptions—Filed February 25, 1932

* * * * * * *

[fol. 141] FINAL JUDGMENT

Be it remembered that the above styled cases were heard before the Honorable Wm. I. Grubb, Judge, on October

6th and 7th, 1931, upon the pleadings, mandate from the Court of Appeals in case No. 323, stipulation of facts and testimony of witnesses, from all of which the Court has made and filed his findings of fact and conclusions of law as a part of the record of said consolidated cases.

It is accordingly ordered and adjudged that E. P. Jacobs plaintiff in case No. 323, have and recover of the United States the sum of $2,919.00 as of October 1st 1925, together with interest thereon from said date at the rate of 6%, amounting to $1,054.28, making a total of $3,973.28 due at this time as compensation for the taking of the right of flowage by the United States for the improvement of navigation on the Tennessee River of 115.2 acres of said farm, [fol. 142] lying between contours 592 and 599 above the Widow's Bar Datum, said farm being described as follows, to-wit:

Situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Gunter, Tucker and McCampbell; on the east by Mrs. Gunter; on the south by Whitcher, Rice and Jones Creek, and on the West by McCampbell, containing 417 acres, more or less.

It is further ordered and adjudged that said plaintiff, E. P. Jacobs, recover of the United States all of the costs incurred in said case No. 323, including the costs of the appeal to the Circuit Court of Appeals for the Fifth Circuit and the remand to this Court. But such costs, however, not to exceed the costs allowed by law under Section 152 of the Judicial Code.

Upon the payment of said judgment, the United States shall be vested with title to said easement of flowage necessary and incident to the erection, maintenance and operation of said Dam, as completed October 1st, 1925.

It is also ordered and adjudged that Augustus Gunter, Executor, and Mrs. Frances Boyd, plaintiff in case No. 2031, have and recover of the United States the sum of $1,030.00 as of October 1st, 1925, together with interest thereon from said date, at the rate of 6%, amounting to $372.00, making a total of $1,402.00 due at this time as compensation for the taking of the right of flowage by the United States for the improvement of navigation on the [fol. 143] Tennessee River of 34.59 acres of said farm,

lying between contours 592 and 599 above the Widow's Bar Datum, said farm being described as follows, to-wit:

Situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Cook and Kelly; on the east by Tennessee River; on the south by Troxell, and on the west by Jacobs and Whitcher, containing 103 acres, more or less.

It is further ordered and adjudged that said plaintiffs, Augustus Gunter, Executor, and Mrs. Frances Boyd, recover of the United States all of the costs incurred in said case No. 2031, such costs, however, not to exceed costs as allowed by law under section 152, Judicial Code.

Upon the payment of said judgment, the United States shall be vested with title to said easement of flowage necessary and incident to the erection, maintenance and operation of said Dam, as completed October 1st, 1925.

To which judgments rendered aforesaid by the Court, the defendant excepts.

Enter.

W. I. Grubb, Judge.

[fol. 144] MOTION FOR NEW TRIAL

Comes the defendant in the above styled causes, and moves the Court for a new trial, and for grounds thereof, assign- the following:

(1). Because the judgments in the causes are contrary to the law and the evidence.

(2). Because the evidence does not support the judgments rendered herein.

(3). Because the great weight of the evidence is contrary to the judgments rendered.

(4). Because the Court erred in assessing damages for the whole of both farms, based upon estimated acreage, when the evidence conclusively showed that there was only 115.2 acres lying between elevations 592 and 599 affected by increased occasional overflows of the Jacobs land; and only 34.59 acres lying between elevations 592 and 599 affected by increased occasional overflows of the Gunter

farm, and that the effects of the dam played out at a flow of 150,000 cubic feet per second, equaling said elevation 599, and that all the other lands of both farms lay above elevation 599, not being affected by the dam; it not being possible that the dam could affect the lands at a higher elevation which were subject to occasional overflows from the river before the construction of Widow's Bar Dam.

(5). Because the Court erred in estimating its damages in taking the acreage estimated in the description of the Jacobs land (said to be 417 acres more or less) when in fact, the Government's surveys by maps made evidence [fol. 145] in the case show that the Jacobs farm involved could not possibly have exceeded 280 acres, and did not base its findings upon the actual acreage of the Jacobs farm as shown by the surveys.

(6). Because the Court erred in not assessing the damage done to actual acreage affected by the dam on each farm by bringing about a slight increase — occasional overflows, namely, 115.2 acres of the Jacobs land lying between elevation- 592 and 599; and 34.59 acres of the Gunter farm lying between elevations 592 and 599.

(7). Because the Court erred in holding that the lands taken in these causes were taken under the 5th Amendment of the Constitution of the United States, and required the payment of just compensation, and that just compensation included interest on the value of the properties taken at the time of the taking up to the time of the rendition of the judgment.

(8). Because the Court erred in allowing interest as a part of the compensation for the lands taken in both causes.

John B. Isbell, United States Attorney. R. M. Sims, Assistant United States Attorney.

[fols. 146 & 147] Opinion Overruling Motion

After due consideration of the foregoing motion, the Court overrules said motion, to which ruling the defendant excepts.

W. I. Grubb, United States District Judge.

ORDER SETTLING BILL OF EXCEPTIONS

Whereupon, the defendant tenders this, its bill of exceptions to the action of the Court in the various particulars therein set out, which is signed, sealed and made a part of the record in the combined causes.

This the 25th day of February, 1932.

W. I. Grubb, Trial Judge.

O. K.

John B. Isbell, United States Attorney, for Defendant. Alon S. Kelly, Chas. C. Moore, Attorneys for Plaintiffs.

[fol. 148] IN UNITED STATES DISTRICT COURT

[Title omitted]

No. 323, No. 2031

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed January 13, 1932

To the Honorable W. I. Grubb, judge of said court:

Now comes the defendant in the above numbered and entitled causes now combined as one cause, by John B. Isbell, United States Attorney, and by R. M. Sims, Assistant United States Attorney, who file this petition by direction of the Attorney General of the United States, and feeling itself aggrieved by the final judgment or judgments of this Court, dated October 15, 1931, in said causes as combined, ordering and decreeing that the plaintiff, E. P. Jacobs in case Number 323 have and recover of the defendant the sum of $2,919.00 as of October 1st, 1925, together with interest [fol. 149] thereon from said date at the rate of 6%, amounting to $1,054.28, making a total of $3,973.28 as compensation for the taking of the right of flowage by the United States for the improvement of the navigation on the Tennessee River of 115.2 acres of his farm, lying between contour elevations 592 and 599 above Widow's Bar Datum, said farm being situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, and bounded on the north by the lands of Gunter, Tucker and McCampbell; on the east by Mrs. Gunter; on the south by Whitcher, Rice and Jones Creek, and on the west by McCampbell, and containing 417 acres, more or less, and

adjudging that the plaintiff, E. P. Jacobs have and recover of the defendant all of the costs incurred in said cause Number 323, including the costs of the appeal to the Circuit Court of Appeals for the Fifth Circuit, and the remand to this Court, such costs not to exceed that allowed by law under Section 152, Judicial Code; and also ordering and decreeing that the plaintiffs, Augustus Gunter, Executor, and Mrs. Frances Boyd in cause Number 2031 have and recover of the defendant the sum of $1,030.00 as of October 1st, 1925, together with interest thereon from said date at the rate of 6%, amounting to $372.00, making a total of $1,402.00 as compensation for the taking of the right of flowage by the United States for the improvement of the navigation of the Tennessee River of 34.59 acres of said farm, lying between contour elevations 592 and 599 above the Widow's Bar Datum, said farm being situated in Jackson County, Alabama, lying along Jones Creek, a tributary of the Tennessee River, bounded on the north by the lands of Cook and Kelly; on the east by the Tennessee River; [fol. 150] on the south by Troxell; and on the west by Jacobs and Whitcher, containing 103 acres, more or less, and adjudging that the plaintiffs, Augustus Gunter, Executor, and Mrs. Frances Boyd have and recover also the costs incurred in said cause Number 2031, such costs not to exceed that allowed by law under Section 152 of the Judicial Code, petition this Honorable Court for an order of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, sitting at Montgomery, Alabama, and files in connection herewith its Assignment of Errors.

Wherefore the defendant prays that the order of appeal be granted, returnable according to law, and that the plaintiffs in said combined cause, or their counsel, be duly cited and served with notice hereof; pray for all necessary orders and decrees necessary to finally perfect such appeal.

This January 6th, 1932.

John B. Isbell, United States Attorney. R. M. Sims, Assistant United States Attorney.

[fol. 151] ORDER

Considering the above and foregoing petition for an appeal, together with the Assignment of Errors:

It is therefore ordered that the defendant be, and it is hereby granted an appeal to the United States Circuit

Court of Appeals for the Fifth Circuit, sitting at Montgomery, Alabama, returnable according to law.

It is further ordered that notice of this appeal be duly given or served upon the plaintiffs, or their counsel, Chas. C. Moore, Chattanooga, Tennessee, and Allan S. Kelly, South Pittsburgh, Tennessee, of record, unless expressly waived by them in writing.

Thus done, ordered and signed this the 13 day of January, 1932.

W. I. Grubb, United States Judge.

[fol. 152] IN UNITED STATES DISTRICT COURT

No. 323, No. 2031

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Jan. 14, 1932

Now comes the defendant in the above numbered and entitled causes as now combined, by its attorneys, and in connection with its petition for an appeal, make and file the following assignments of error, wihch they allege occurred on the trial and hearing, and the rendition of the judgment in the causes as combined, upon which it will rely in the prosecution of this appeal, namely:

I

The District Judge erred in rendering judgment in the combined causes contrary to the law and evidence.

[fol. 153] II

The District Judge erred in rendering judgment in the combined causes, that were not supported by the evidence.

III

The District Judge erred in rendering judgment in the combined causes in favor of the Plaintiff E. P. Jacobs contrary to the great weight of evidence given in the trial thereof.

IV

The District Judge erred in rendering judgment in the combined causes in favor of the Plaintiff Augustus Gunter, et al., contrary to the great weight of evidence in the trial thereof.

V

The District Judge erred in assessing the damages for the whole of both farms, separately and severally, at a uniform rate of $7.00 per acre for 417 estimated acres of the whole of the Jacobs farm, and $10.00 per acre for 103 estimated acres of the whole of the Gunter farm, when there was only 115.2 acres of the Jacobs farm taken, and 34.59 acres of the Gunter farm taken on account of the construction of the dam.

VI

The District Judge erred in assessing the damages for the whole of the Jacobs farm at the uniform rate of $7.00 [fol. 154] per acre for 417 estimated acres of the whole thereof, when there was only 115.2 acres of the farm actually taken on account of the construction of the dam.

VII

The District Judge erred in assessing the damages for the whole of the Gunter farm at the uniform rate of $10.00 per acre for 103 estimated acres thereof, when there was only 34.59 acres of the whole farm actually taken on account of the construction of the dam.

VIII

The District Judge erred in assessing damages for the whole of both farms, separately and severally, based upon estimated acreage, when the evidence conclusively showed that there was only 115.2 acres lying between elevations 592 and 599 affected by increased occasional overflows of the Jacobs land; and only 34.59 acres lying between contour elevations 592 and 599 Widow's Bar Datum affected by increased occasional overflows of the Gunter farm, and that the effects of the dam played out at a flow of 150,000 cubic feet per second, equaling said elevation 599, and that all other lands of both farms lay above elevation 599, not

being affected by the dam; it not being possible that the dam could affect the lands at a higher elevation which were also subject to occasional overflows from the river prior to the completion of Widow's Bar Dam.

[fol. 155] IX

The District Judge erred in assessing damages for the whole of the E. P. Jacobs farm, based upon estimated acreage, when the evidence conclusively showed that there was only 115.2 acres lying between elevations 592 and 599 Widow's Bar Datum affected by increased occasional overflows of the Jacob's land; and that the effects of the dam played out at a flow of 150,000 cubic feet per second, equaling said elevation 599, and that all other lands of the farms that lay above elevation 599, not being affected by the dam; it not being possible that the dam could affect the lands at a higher elevation which were also subject to occasional overflows from the river prior to the completion of Widow's Bar Dam.

X

The District Judge erred in assessing damages for the whole of the Augustus Gunter farm, based upon estimated acreage, when the evidence conclusively showed that there was only 34.59 acres lying between elevations 592 and 599 Widow's Bar Datum affected by increased occasional overflows of the Gunter land; and that the effects of the dam played out at a flow of 150,000 cubic feet per second, equaling said elevation 599, and that all other lands of the farm that lay above elevation 599, not being affected by the dam; it not being possible that the dam could affect the lands at a higher elevation which were also subject to occasional overflows from the river prior to the completion of Widow's Bar Dam.

[fol. 156] XI

The District Judge erred in estimating and arriving at the amount of damages assessed to the E. P. Jacobs farm, by taking the acreage estimated in the description of the Jacobs Lands (said to be 417 acres, more or less), when in fact the Government's surveys by maps made evidence in the cases showed that the Jacobs farm involved could not possibly have exceeded 280 acres, and did not base his

findings upon the actual acreage of the Jacobs farm as shown by the surveys.

XII

The District Court erred in not assessing the damage done to actual acreage affected by the dam on each farm, separately and severally, by bringing about a slight increase of occasional overflows, affecting or applying to 115.2 acres of the Jacobs farm; and 34.59 acres of the Gunter farm lying between contour elevations 592 and 599, Widow's Bar Datum.

XIII

The District Court erred in not assessing the damage done to the actual acreage affected on the Jacobs farm, by bringing about a slight increase of occasional overflows, affecting or applying to 115.2 acres of the Jacobs farm.

XIV

The District Judge erred in not assessing the damage done to the actual acreage affected on the Gunter farm, [fol. 157] by bringing about a slight increase of occasional overflows, affecting or to 34.59 acres of the Gunter farm lying between contour elevations 592 and 599, Widow's Bar Datum.

XV

The District Court erred in holding that the causes were founded on the 5th Amendment of the Constitution of the United States, and required the payment of just compensation, and that just compensation included interest on the value of the properties or rights of flowage therein taken at the time of the taking, from the time of such taking up to the time of the rendition of the judgment.

XVI

The Court erred in allowing interest as a part of the compensation for the lands taken in the causes.

XVII

The District Judge erred in allowing the sum of $1,054.28 as interest as a part of the compensation and damage for the taking of the Jacobs land.

XVIII

The District Judge erred in allowing the sum of $372.00 as interest as a part of the compensation and damage for the taking of the Gunter lands.

[fols. 158-161] XIX

The District Judge erred in rendering judgment against the United States for the costs of the former appeal of the cause of E. P. Jacobs vs. United States to the Circuit Court of Appeals of the United States for the Fifth District.

Wherefore the defendant in the above styled consolidated causes and each of them, pray that the judgment or judgments of the District Court of the United States for the Northeastern Division of the Northern District of Alabama be reversed, and proper judgment or judgments rendered by the Circuit Court of Appeals of the 5th Circuit, or such judgment or judgments rendered by it as should have been rendered by said District Court, or the causes remanded for a new trial thereof, in accordance with such directions as the Circuit Court of Appeals may direct.

This January 6th, 1932.

John B. Isbell, United States Attorney. R. M. Sims, Assistant United States Attorney, for Defendant.

Presented this January 13, 1932.

W. I. Grubb, District Judge.

[fol. 162] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 163] Minute entry of argument and submission, January 3, 1933, omitted in printing.

[fol. 164] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 6567

UNITED STATES OF AMERICA, Appellant,

versus

E. P. JACOBS and AUGUSTUS GUNTER, Executor, et al., Appellees

Appeal from the District Court of the United States for the Northern District of Alabama

(February 13, 1933)

Before Bryan, Foster, and Walker, Circuit Judges

OPINION OF THE COURT—Filed February 13, 1933

BRYAN, Circuit Judge:

The United States, for the purpose of improving navigation, constructed Widow's Bar Dam across the Tennessee River. Appellees Jacobs and Gunter, claiming that the dam holds back flood waters which injure their lands located above it, brought separate suits under the Tucker [fol. 165] Act, 28 U. S. C. A. § 41 (20), to recover compensation for the damage done. From an adverse judgment Jacobs appealed and secured a reversal, this court holding that on the facts found by the district judge he was entitled to compensation. Jacobs v. United States, 45 F. (2) 34. Before the second trial the two cases were consolidated, and in each judgment was entered against the United States, including interest on the principal amount awarded as compensation from the date of the completion of the dam. The judgment in the Jacobs case included also the costs of his former appeal. The only assignments of error relied on relate to the items of interest and costs of appeal.

The Acts of Congress authorizing the construction of Widow's Bar Dam (39 Stat. 399; 40 Stat. 1282) did not direct the appropriation of any particular property or authorize payment to be made for flowage rights. Those acts were considered in our former opinion in the Jacobs

case; it was recognized that no right of action existed under them, and held that recovery must be had if at all upon an implied contract. The opinion then proceeded to hold that flowage damage to privately owned property was contemplated by the Government and that the property of Jacobs was taken, not in the commission of a tort for which there would be no liability, but under an implied promise to pay for the resulting damage. 45 F. (2) 34. In condemnation proceedings instituted by the Government interest is allowed from the date of the actual taking as a part of just compensation under the Fifth Amendment. United States v. Rogers, 255 U. S. 163. As a general rule however, except where otherwise provided by agreement or by the express words of a statute, interest is not recoverable in suits brought against the United States upon unpaid accounts or claims. Boston Sand Co. v. United States, 276 U. S. 41. And it is provided by statute that "no interest shall be allowed on any claim up [fol. 166] to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest," etc. Revised Statutes § 1091; 28 U. S. C. A. § 284. This statute applies equally to district courts exercising jurisdiction under the Tucker Act "concurrent with the Court of Claims." 28 U. S. C. A. § 41 (20). As the sovereign cannot be sued without its consent, it was competent for Congress in giving consent to suits against the United States upon private claims to impose the condition that such claims should not draw interest. Interest may not be collected "when the Government without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title," because the property owner's only right to bring suit against it in the Court of Claims or in a district court is not founded upon the Fifth Amendment but upon the existence of an implied promise or contract to pay the value of the property taken. United States v. North American Co., 253 U. S. 330. The just cited case is controlling on the question now under consideration. The suit there as here was held to be upon an implied contract. There is nothing in conflict with it in other Supreme Court decisions relied on by appellees. United States v. Rogers, supra, and Seaboard Air Line Ry. v. United States, 261 U. S. 299, were condemnation cases.

In each the North American case was referred to and distinguished on the ground that it was not a condemnation case. In United States v. Cress, 243 U. S. 316, in the course of the opinion the statement was made that the judgments entered in the court below included interest; and those judgments were affirmed. But it was not stated that the interest ran from the date the property was taken; and for all that appears interest was calculated only from the date of the judgment. In Hurley v. Kincaid, 285 U. S. 95, the question of interest was not considered.

[fol. 167] Costs, unless they are directly authorized by statute, are not taxable against the United States. United States v. Chemical Foundation, 272 U. S. 1, 20. Section 152 of the Judicial Code (28 U. S. C. A. § 258) provides for the allowance of costs against the Government, including however only the amounts actually incurred for witnesses and "fees paid to the clerk of the court." The costs referred to are those incurred in the trial court, and there is no provision for costs incurred in the appellate court. Our rule XXXI (4) provides that "no costs shall be allowed in this court for or against the United States." We think therefore that the trial court erred in entering judgment for the costs of this court on the former appeal in the Jacobs case.

The judgments will have to be reversed, and new judgments entered for the damages already ascertained, with interest from the date thereof, and such costs in the district court as are allowed by law. Accordingly, the judgments are reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

[fol. 168] In United States Circuit Court of Appeals

No. 6567

United States of America

versus

E. P. Jacobs and Augustus Gunter, Executor, et al.

Judgment—February 13, 1933

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this cause be, and the same are hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

[fol. 169] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 170] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed May 17, 1933

In this cause, it is stipulated by the parties that parts of the printed record used in the Court below and filed in this Court on application for certiorari are not material to the decision of the question before this Court and the same may be omitted by the Clerk in printing the record, as follows, to-wit:

(1) All of the bill of exceptions, beginning on page 45, ending on page 141, will be omitted.

(2) Agreement on page 147 will be omitted.

(3) Order to transmit original maps, beginning on page 159, ending on page 160, will be omitted.

(4) Præcipe for transcript, beginning on page 160, ending on page 162, will be omitted.

In lieu of the omitted parts of the record above stated, the Clerk will please print this stipulation in the record, showing the parts omitted.

Chas. C. Moore, Attorney for Petitioners. J. Crawford Riggs, Solicitor General of the United States.

May 16, 1933.

[fol. 170½] [File endorsement omitted.]

[fol. 171] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 8, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,503. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 15. E. P. Jacobs and Augustus Gunter, executor of the last will of Mrs. S. B. Gunter, deceased, petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed March 27, 1933. File No. 15, O. T., 1933.

FILE COPY

No. [redacted] .15

Office Supreme Court, U.S.
FILED
MAR 27 1933
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

E. P. JACOBS, and AUGUSTUS GUNTER, Executor of the Last Will of MRS. S. B. GUNTER, Deceased,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Defendant.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF SUPPORTING PETITION.

CHARLES C. MOORE,
Attorney for Petitioners.

KELLY & KELLY,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for writ of certiorari	1–5
Summary statement of the matter involved	1
Reasons relied on for allowance of the writ	2
Prayer for writ	5
Brief supporting petition for writ of certiorari	7–21
Statement	7–10
Argument	11–21

Cases Cited.

Bowman v. Ross, 167 U. S. 548	16
Brownsville v. Cavazos, 100 U. S. 138	12
Cherokee Nation v. Southern Kansas Rwy. Co., 135 U. S. 641	12
Equitable Ins. Co. v. Hearne, 20 Wall. 494	17
Garrison v. Mayor etc. of New York, 88 U. S. 196	12, 16
Grenada Co. Supervisors v. Brown, 112 U. S. 261	18
Hurley v. Kincaid, 285 U. S. 95	4, 12, 21
Ingleheart v. Ingleheart, 204 U. S. 478	18
Jacobs v. U. S., 45th Fed. (2) 34	9
Jones v. N. O. & S. R. R. Co., 70 Ala. 227	20
Kennedy v. Indianapolis, 103 U. S. 599	12
Mason City & Ft. Dodge Rwy. Co. v. Boynton, 204 U. S. 570	11
Miller v. U. S., 11 Wall. 268	18
Monongahela Nav. Co. v. U. S., 148 U. S. 312	18
National Casket Co. v. U. S., 263 Fed. 246	15

Rodgers v. U. S., 185 U. S. 83 18
Seaboard Air Line Rwy. v. U. S., 261 U. S. 299 ..... 3, 13, 16, 17, 18
Shoemaker v. U. S., 147 U. S. 282 20
Templers etc. Co. v. Jarman, 187 U. S. 197 18
The Japanese Immigrant Case, 189 U. S. 86 18
United States v. Jones, 109 U. S. 513 12
United States v. Lynah, 188 U. S. 445 12
U. S. v. Babbitt, 95 U. S. 334 17
U. S. v. First Natl. Bank, 250 Fed. 299 20
U. S. v. No. Amer. Trad. & Transp. Co., 253 U. S. 330 ..... 4, 16, 19
U. S. v. Rogers, 255 U. S. 163 ..... 3, 16, 17
U. S. v. Wittberger, 5 Wheat. 76 17

Other Authorities.

U. S. C. A.:

Title 33, Secs. 591-594 ..... 2, 11, 12, 15
Title 28, Sec. 284 ..... 3, 4, 17
Title 22, Sec. 591 20

39 U. S. Statutes 399, Sec. 1 8

40 U. S. Statutes 1282, Sec. 1 8

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

E. P. JACOBS, and AUGUSTUS GUNTER, Executor of the Last Will of MRS. S. B. GUNTER, Deceased,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Defendant.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of E. P. Jacobs and Augustus Gunter, executor, etc., respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The matter involved herein is the liability of the United States for the equivalent of interest from the date of the taking upon the value of private property taken for pub-

lic use. In these cases the Government took possession of the land, pursuant to an act of Congress for improvement of navigation, without instituting proceedings to ascertain the compensation to be paid therefor. The Secretary of War, through the Board of Engineers of the United States, negotiated with and made offers to pay petitioners, which offers were deemed inadequate, and these two proceedings were brought by the respective petitioners, under the provisions of the Tucker Act, in the District Court of their residence, to determine the amount of just compensation as of the date of the taking. Six years elapsed before judgment was finally entered by the District Court fixing the value as of the date of the taking and adding 6 per cent per annum from the date of the taking to compensate for the delay in payment (R. 33-36).

On appeal by the United States to the Circuit Court of Appeals for the Fifth Circuit, this judgment was affirmed as to the value allowed at the time of the taking, but interest or other equivalent for delay in payment was denied (R. 166).

Petitioners insist that this was error.

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

First. In the absence of agreement, it was the duty of the Secretary of War to institute and diligently prosecute proceedings in condemnation to ascertain the amount of compensation to be paid for petitioners' lands needed for this work of river improvement (U. S. C. A., Title 33, Sections 591-594).

If such proceedings had been taken, it is settled law that interest or other equivalent for delay in payment would have been allowed.

U. S. v. Rogers, 255 U. S. 163;
Seaboard Air Line Rwy. v. U. S., 261 U. S. 299.

This was recognized in the opinion of the Circuit Court of Appeals, but it was held that this rule did not apply to the instant cases because these were not condemnation suits.

Petitioners insist that such holding is in conflict with the holding of this Court in **Seaboard Air Line Rwy. v. U. S.**, supra. When an officer of the Government takes possession of private property for public use, pursuant to an act of Congress authorizing him to do so, the property is thereby condemned. The proceeding to ascertain the just compensation to be paid for such property is a part of the condemnation necessary to vest title, whether instituted by the United States or instituted by the property owner. No distinction can be made in the amount of compensation to be paid because the property owner is plaintiff instead of defendant.

Second. The Circuit Court of Appeals held that the implied contract on the part of the Government to pay petitioners just compensation for their property taken for public use as of the date of the taking was not "a contract expressly stipulating for the payment of interest," and, consequently, interest could not be allowed under **28 U. S. C. A., Sec. 284.**

Petitioners insist that the implied contract on the part of the Government was to pay "just compensation," and that interest or some other equivalent for delay in pay-

ment is a part of such compensation. It is not limited to the market value of the property at the time of the taking.

Third. The Circuit Court of Appeals disallowed interest from the date of the taking, on the ground that interest was prohibited by **Statute Sec. 284, Title 28, U. S. C. A.** Petitioners insist that the just compensation required to be paid by the Fifth Amendment can neither be enlarged nor restricted by statute, and that the Circuit Court of Appeals erred in holding that this statute prohibited the allowance of interest.

Fourth. The Circuit Court of Appeals held that these cases were ruled by the holding of this Court in **U. S. v. No. Amer. Trad. & Transp. Co., 253 U. S. 330.** Petitioners insist that the holding in that case has no application to the instant cases.

Fifth. In the case of **Hurley v. Kincaid, 285 U. S. 95,** this Court denied the right of injunction by a property owner to restrain the Secretary of War from taking possession of private property without first instituting proceedings in condemnation. The ground of this Court's holding was:

> "Complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the act and the authority of the defendants are conceded. The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceeding, which it is contended the statute required" **(285 U. S. 98).**

The Circuit Court of Appeals distinguished the instant cases, with the statement,

"In Hurley v. Kincaid, 285 U. S. 95, the question of interest was not considered."

Petitioners insist that the right to interest or other equivalent from the date of the taking to the time of judgment was necessarily considered by this Court in said case, and the decision sustains their position herein.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6567, United States of America, Appellant, v. E. P. Jacobs and Augustus Gunter, Executor, et al., Appellees, and that the said judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

E. P. JACOBS, and AUGUSTUS GUNTER, EXEC.,
Petitioners,

By CHARLES C. MOORE,
Attorney for Petitioners.

KELLY & KELLY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

E. P. JACOBS, and AUGUSTUS GUNTER, Executor of the Last Will of MRS. S. B. GUNTER, Deceased,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Defendant.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

STATEMENT.

The question in these cases is whether the United States is liable for the equivalent of interest as part of the just compensation required to be paid to petitioners for their land taken by the United States in the improvement of navigation on the Tennessee River in the State of Alabama. The undisputed facts necessary to be considered are these:

In 1916 Congress directed improvement of the Tennessee River for navigation purposes adjacent to the lands of petitioners in the State of Alabama, on condition that

> "local interests shall assume and pay all claims for flowage damage or arrange to do so in manner satisfactory to the Secretary of War" (Sec. 1, 39 U. S. Statutes 399).

Such arrangement was not made and in March, 1919, Congress again directed that this work of river improvement should proceed and provided:

> "The condition precedent, requiring local interests to assume and pay claims for flowage damage, be waived" (Sec. 1, 40 U. S. Statutes 1282).

Thereafter the work was done by building a dam across the Tennessee River at Widow's Bar, some eight (8) miles below the lands of these petitioners, which impeded the natural flow of the river and caused flowage damage to petitioners' lands. This work was completed and the lands overflowed on October 1, 1925 (R. 38).

Later the Government caused surveys to be made and ascertained that flowage easements in 115.2 acres of the lands of petitioner Jacobs and 34.59 acres of the lands of petitioner Gunter's intestate were actually taken by reason of the construction of this Widow's Bar Dam (R. 41). After negotiations and offers of settlement from the Government, each of petitioners brought these proceedings under the Tucker Act, in the United States District Court of their residence (R. 1-12).

At the trial the District Judge dismissed the proceedings because the flooding was intermittent and petitioners had not been wholly evicted thereby. By agreement, the Gunter case was held in court to await an appeal in the Jacobs case (R. 30). Upon appeal the Circuit Court of Appeals for the Fifth Circuit reversed the judgment in the Jacobs case and held that the land of petitioner had been taken, that he was entitled to just compensation therefor and re-

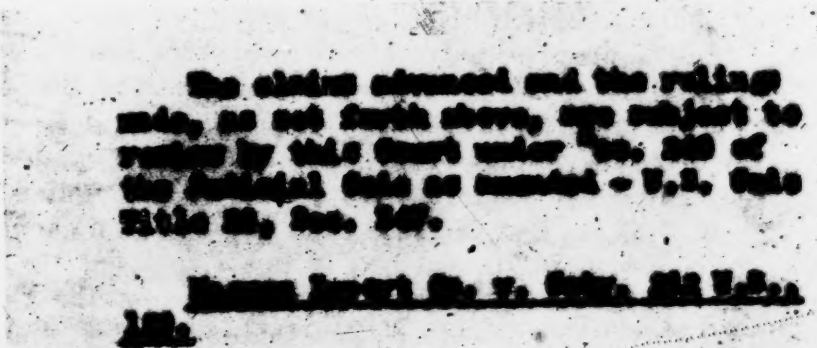
manded the case to ascertain the amount of just compensation (R. 26).

Jacobs v. U. S., 45th Fed. (2) 34.

On the second trial the cases were consolidated (R. 32) and judgment was entered by the District Judge for the value of the land taken, together with interest at the rate of 6 per cent from the date of the taking, in favor of each of petitioners (R. 141-143). This was appealed by the Government (R. 148-151) and the Circuit Court of Appeals affirmed the judgment as to the value of the land taken, but denied interest from the date of the taking (R. 166). In disposing of this question the Circuit Court of Appeals said:

> "In condemnation proceedings instituted by the Government interest is allowed from the date of the actual taking as a part of just compensation under the Fifth Amendment **(United States v. Rogers, 255 U. S. 163)**. As a general rule, however, except where otherwise provided by agreement or by the express words of a statute, interest is not recoverable in suits brought against the United States upon unpaid accounts or claims **(Boston Sand Co. v. United States, 276 U. S. 41)**. And it is provided by statute that 'no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest,' etc. **(Revised Statutes, Sec. 1091; 28 U. S. C. A., Sec. 284)**. This statute applies equally to District Courts exercising jurisdiction under the Tucker Act 'concurrent with the Court of Claims' **(28 U. S. C. A., Sec. 41 [20])**. As the sovereign cannot be sued without its consent, it was competent for Congress in giving consent to suits against the United States upon private claims to impose the condition that such claims should not draw interest. Interest

may not be collected 'when the Government without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title,' because the property owner's only right to bring suit against it in the Court of Claims or in a District Court is not founded upon the Fifth Amendment, but upon the existence of an implied promise or contract to pay the value of the property taken **(United States v. North American Co., 253 U. S. 330)**. The just cited case is controlling on the question now under consideration. The suit there, as here, was held to be upon an implied contract. There is nothing in conflict with it in other Supreme Court decisions relied on by appellees. **United States v. Rogers**, supra, and **Seaboard Air Line Rwy. v. United States, 261 U. S. 299**, were condemnation cases. In each the North American case was referred to and distinguished on the ground that it was not a condemnation case. In **United States v. Cress, 243 U. S. 316**, in the course of the opinion the statement was made that the judgments entered in the court below included interest, and those judgments were affirmed. But it was not stated that the interest ran from the date the property was taken, and for all that appears interest was calculated only from the date of the judgment. In **Hurley v. Kincaid, 285 U. S. 95**, the question of interest was not considered" (R. 166).



ERRORS ASSIGNED AND

ARGUMENT.

We respectfully insist that the Court of Appeals erred in its opinion and holding quoted above, for the reasons stated in the petition for certiorari.

First. The federal statutes make it the duty of the Secretary of War to institute proceedings for the condemnation

> "of any lands, easements or rights of way needed for a work of rivers and harbors improvements" (U. S. C. A., Title 33, Sec. 591),

and that the Secretary of War

> "shall have the right to take immediate possession of said lands, easements or rights of way, to the extent of the interest to be acquired" (U. S. C. A., Title 33, Sec. 594).

Under this authority the Secretary of War took "immediate possession" of petitioners' lands by the construction and closing of the dam on October 1, 1925. He then proceeded to ascertain the amount of the damage by surveys and made offer to pay the amount so ascertained (R. 42). Petitioners were not satisfied to accept the offers made and brought these proceedings wherein it was adjudged that they were entitled to several times the amount offered (R. 141-142).

While the statute gives the right of "immediate possession" because the public necessity cannot wait on the procedure to ascertain the amount of the compensation, title does not vest in the United States until the amount of compensation is ascertained and payment made.

Mason City & Ft. Dodge Rwy. Co. v. Boynton, 204 U. S. 570;

Cherokee Nation v. Southern Kansas Rwy. Co., 135 U. S. 641;
Kennedy v. Indianapolis, 103 U. S. 599;
Brownsville v. Cavazos, 100 U. S. 138;
United States v. Lynah, 188 U. S. 445.

The Constitution makes it the duty of the Government before taking title to petitioners' land to ascertain and pay just compensation **(Garrison v. Mayor etc. of New York, 88 U. S. 196)**, and the statute had charged the Secretary of War with the discharge of this duty **(U. S. Code, Title 33, Sec. 591)**. The required proceeding to ascertain the amount of compensation to be paid is not an adverse lawsuit in the ordinary sense, but a mere "inquisition to establish a particular fact" **(United States v. Jones, 109 U. S. 513)**. It is a necessary proceeding to complete the condemnation and vest title in the Government.

The flooding of petitioners' property by this dam across the Tennessee River, completed October 1, 1925, was a taking, probably from the time the dam was started, certainly from the time it was completed **(U. S. v. Lynah,** supra; **Hurley v. Kincaid, 285 U. S. 95)**. This taking was pursuant to statute and lawful. The statutes also provided procedure for ascertaining the value. One statute authorized the Secretary of War to institute the proceeding. Another statute authorized these petitioners to institute the proceedings in case the Secretary of War failed to do so (**U. S. v. Lynah,** supra; **Hurley v. Kincaid,** supra). The proceedings by these petitioners seek nothing except ascertainment of the just compensation due them. If these proceedings had been instituted in the name of the United States by the Secretary of War the Court could do no more than adjudicate the amount of compensation due. The power of the Court and the question involved is ex-

actly the same in both proceedings. One or the other is necessary to complete the condemnation.

Petitioners insist their position is sustained by the holding of this Court in **Seaboard Air Line Rwy. v. U. S., 261 U. S. 299.** The facts of that case are that the Government had seized lands belonging to the railroad to provide storage facilities for war material under authority of the Lever Act. As provided in that statute, the Government had made an estimate of the value of the land taken and tendered that amount in payment. The landowner was not satisfied and brought suit in the District Court.

In deciding that case, this Court said:

> "Section 10 of the Lever Act authorizes the taking of property for public use on payment of just compensation. There is no provision in respect to interest. Just compensation is provided for by the Constitution, and the right to it cannot be taken away by statute. Its ascertainment is a judicial question (Monongahela Nav. Co. v. U. S., 148 U. S. 312). The compensation to which the owner is entitled is the value and perfect equivalent of the property taken (Monongahela Nav. Co. v. U. S., supra). It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken (U. S. v. Rogers, 257 Fed. 397). He is entitled to the damages inflicted by the taking (No. Pac. R. R. Co. v. No. Amer. Tel. Co., 230 Fed. 347).
>
> "The United States, in effect, claims that the owner is entitled to no more than the value of the land as of the date of taking, to be paid at a later time when ascertained. The owner has been deprived of the land and its use since the taking, May 23, 1919. The value of the property, as ascertained by the President, was $235.80 and this was allowed with interest from

the date of taking. But, as judicially determined later, the value when taken was $6,000.00.

"The owner's right does not depend on contract, expressed or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure instituted by the United States for the condemnation of land. The owner was not satisfied by the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation.

• • • • • • •

"The only question here is whether the payment at a subseqent date of the value of land as of the date of taking possession is sufficient to constitute just compensation. In support of its contention, the Government cites U. S. v. No. Amer. Trans. & Trad. Co., 253 U. S. 330. That case does not sustain its contention. That was a suit in the Court of Claims, based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it, adopted by the conformity provisions.

"The case of U. S. v. Rogers, 255 U. S. 163, is a condemnation case and it was held that the owner was entitled, as a part of the just compensation, to interest on the confirmed award of the commissioners from the time when the United States took possession. The land was situated in New Mexico, and the proceedings were had under the Conformity Act of August 1, 1888. Interest was allowed, not by virtue of state statute, but as constituting a part of the just compensation safeguarded by the Constitution.

• • • • • • •

"It is obvious that the owner's right to just compensation cannot be made to depend upon state statutory provisions. The Constitution safeguards the right and Sec. 10 of the Lever Act directs payment. The rule above referred to, that, in the absence of agreement to pay or statute allowing it, the United States will not be held liable for interest on unpaid accounts and claims, does not apply here. The requirement that 'just compensation' shall be paid is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value, paid contemporaneously with the taking. Interest at the proper rate is a good measure by which to ascertain the amount so to be added" **(261 U. S. 299-306).**

While the Lever Act, under which the above case was decided, expressly authorized suit in the District Court, without limit in amount for compensation for property taken in event the property owner was not satisfied with the amount fixed by the President, we insist that does not distinguish from the instant cases. The suit so authorized had to follow the procedure of the Tucker Act **(National Casket Co. v. U. S., 263 Fed. 246).**

Sec. 591, Title 33, U. S. Code, under which the property of petitioners was taken, does not expressly authorize them to sue, but the Tucker Act did authorize these suits. The fact that the authority to sue was given in a separate statute should not distinguish the cases. There is no other difference.

Second. It may well be doubted whether the fiction of implied contract is necessary to confer upon the District Court jurisdiction of proceedings of this kind, since the provisions of the Tucker Act carried into the U. S. Code at Sec. 41 (20), Title 28, embrace "claims not exceeding $10,000.00 founded upon the Constitution of the United States, * * * or for damages, liquidated or unliquidated in cases not sounding in tort." It is also doubtful whether these suits are founded upon implied contracts.

Garrison v. Mayor etc. of New York, 88 U. S. 196;
Seaboard Air Line Rwy. v. U. S., supra.

However, accepting the theory of implied contract, the question arises: What is the contract? The Circuit Court of Appeals in the instant case has construed the contract to be that the United States would pay the value of the land taken at some future time when that value was ascertained.

We respectfully insist that such was not the contract which the law implies, because where the owner has been deprived of valuable use of his property, payment at some future time is not "just compensation," within the constitutional requirement.

Bowman v. Ross, 167 U. S. 548;
U. S. v. No. Amer. Transp. & Trad. Co., 253 U. S. 335;
U. S. v. Rogers, supra;
Seaboard Air Line Rwy. v. U. S., supra.

Since the payment of just compensation is a condition precedent to vesting title, the implied contract must be to pay "just compensation" as required by the Constitution and defined by this Court.

We have seen that such just compensation includes more than the value at the time of the taking, paid at a subsequent time. It includes interest or some other equivalent for the delay in payment. Hence, we insist that the contracts included some equivalent for the delay in payment and that interest as allowed by the District Judge is "a good measure" of that equivalent.

Seaboard Air Line Rwy. v. U. S., supra;
U. S. v. Rogers, supra.

Third. Section 284, Title 28, U. S. Code, providing that no interest be allowed by the Court of Claims unless the contract sued on expressly stipulates for interest, prohibits the adding of interest to the amount of the "claim" sued on.

In the instant cases, the per cent added by the District Judge for delay was part of the "claim" itself, and not interest added within the meaning of the cited section of the U. S. Code. It may be called interest only in the sense that it is part of what the contracts "stipulate" shall be paid. In that sense, it comes within the meaning of this statute as interest "expressly" stipulated. This view is supported by these considerations:

A contract is to be construed according to the intention of the parties, and what is implied is as effectual as what is expressed.

Equitable Ins. Co. v. Hearne, 20 Wall. 494;
U. S. v. Babbitt, 95 U. S. 334.

A statute is to be construed to effectuate the legislative intention, and a case within the intention must be considered within the letter of the statute.

U. S. v. Wittberger, 5 Wheat. 76;

Ingleheart v. Ingleheart, 204 U. S. 478;
Rodgers v. U. S., 185 U. S. 83.

Here we have implied contracts which included interest or other equivalent for the delay in payment. We are considering the application to these contracts of a statute, the purpose of which was to prohibit the allowance of interest unless interest was intended by the parties. The words "unless upon a contract expressly stipulating for the payment of interest," as used in this statute, must be construed to mean that it shall appear to the Court that the parties intended the payment of interest. Otherwise, the letter of the statute will defeat the purpose of the parties and impair the obligations of the contract.

Templers etc. Co. v. Jarman, 187 U. S. 197.

Another applicable rule is to adopt that construction which will save the constitutionality of the statute.

Grenada Co. Supervisors v. Brown, 112 U. S. 261;
The Japanese Immigrant Case, 189 U. S. 86;
Miller v. U. S., 11 Wall. 268.

If this statute is construed to limit the power of the Court to award just compensation, then it is invalid because "just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function."

Seaboard Air Line Rwy. v. U. S., supra;
Monongahela Nav. Co. v. U. S., 148 U. S. 312.

Hence, we insist this statute must be construed not to prohibit the allowance of interest in these cases.

Fourth. The Circuit Court of Appeals applied to the instant cases the holding of this Court in **U. S. v. No. American Transp. & Trad. Co., 253 U. S. 330.**

We insist that case is distinguished from the instant cases on these grounds:

(a) The District Judge found as a fact in these cases that the addition of 6 per cent per annum was necessary to give petitioners the just compensation to which they were entitled.

In the North American case there was no such finding. On the contrary, this Court in its opinion says:

> "The facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest" **(253 U. S. 338).**

(b) The instant cases are necessary parts of condemnation proceedings to ascertain the value of property taken for public use by an officer of the United States pursuant to statutes authorizing the taking.

The North American case was not a condemnation proceeding. It was brought to recover the value of property which had been seized by a general of the United States Army without authority. The suit had been pending two years before the United States took legal possession of the property. The second count of the petition was for rent alleged to have accrued during the time the property was unlawfully held. For this the United States was not liable, nor was it liable for the property itself when the suit was brought. It became liable before judgment, and the amount of that liability was allowed. The Court referred to the fact that there was a long delay in the litigation as a matter for which the owner may have been largely responsible.

The claim of the owner was that interest accrued as a

matter of law. This claim was rejected and interest denied in accordance with the rule that interest is not to be added unless necessary to give to the owner just compensation.

Shoemaker v. U. S., 147 U. S. 282.

(c) The property for which compensation is sought in the instant cases is situated in the State of Alabama. The laws of that state "relating to suit for condemnation of property" provide that interest shall be added from the time of the taking.

Jones v. N. O. & S. R. R. Co., 70 Ala. 227;
U. S. v. First Natl. Bank, 250 Fed. 299.

The federal statute under which this property was taken provides that proceedings to ascertain the value

> "shall be prosecuted in accordance with the laws relating to suits for the condemnation of property of the state wherein the proceeding may be instituted" **(U. S. Code, Title 22, Sec. 591).**

This statute adopts the local law as the applicable rule in these cases.

In the North American case the property was situated in Alaska. There was no local law to be adopted, and the opinion of this Court distinguished that case from cases controlled by the local laws of the states on that ground **(253 U. S. 335).**

Fifth. If the rule announced by the Circuit Court of Appeals in this case prevails, then the amount which the landowner will receive for property taken for public use will be greater when the Government institutes the proceedings for condemnation than it will be if the landowner, after negotiating for some years, is compelled to institute and prosecute such proceedings through the

courts. In this case six years elapsed and the recovery of the landowners was increased 36 per cent because of the delay. If the landowner must suffer this much loss because the Government failed to institute proceedings for condemnation, then the remedy which is afforded to him by suit at law is not adequate. In justice, he ought to be permitted to maintain injunction against the Government to restrain it from taking possession until or unless condemnation proceedings are instituted by it, or payment is made at the time of the taking.

But this Court has ruled that he cannot maintain such injunction because his remedy at law will give the same compensation.

Hurley v. Kincaid, 285 U. S. 95.

In the instant case the lower court disposed of the above-cited holding of this Court with the statement: "The question of interest was not considered." We most respectfully insist that the question of interest was considered and ruled with petitioners' contention. The ground of the decision of this Court in the Hurley case was that the measure of compensation is the same, regardless of the procedure to ascertain it. In so holding this Court necessarily considered that interest will be added in the one proceeding as well as in the other when the rule of just compensation requires it.

For the reasons alleged in the petition we insist the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

CHARLES C. MOORE,
Attorney for Petitioners.

KELLY & KELLY,
Of Counsel.

FILE COPY

FILED
AUG 10 1933
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 15.

E. P. JACOBS and AUGUSTUS GUNTER, Executor of the Last Will of MRS. S. B. GUNTER, Deceased,
Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONERS.

CHARLES C. MOORE,
Attorney for Petitioners.

KELLY & KELLY,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Specification of errors	6
Summary of the argument	7
Argument	8
First point	8
Second point	10
Third point	12
Fourth point	13
Fifth point	16

Cases Cited.

Boston Sand Co. v. United States, 276 U. S. 41	5
Bowman v. Ross, 167 U. S. 548	11
Brownsville v. Cavazos, 100 U. S. 138	9
Cherokee Nation v. Southern Kansas Rwy. Co., 135 U. S. 641	9
Equitable Ins. Co. v. Hearne, 20 Wall. 494	12
Garrison v. Mayor etc. of New York, 88 U. S. 196	9, 10
Grenada Co. Supervisors v. Brown, 112 U. S. 261	13
Hurley v. Kincaid, 285 U. S. 95	6, 9, 16
Ingleheart v. Ingleheart, 204 U. S. 478	12
Jacobs v. U. S., 45 F. (2d) 34	4

Jones v. N. O. & S. R. R. Co., 70 Ala. 227..... 15
Kennedy v. Indianapolis, 103 U. S. 599..... 9
Mason City & Ft. Dodge Rwy. Co. v. Boynton, 204 U. S. 570..... 9
Miller v. U. S., 11 Wall. 268..... 13
Monongahela Nav. Co. v. U. S., 148 U. S. 312..... 13
Phelps v. U. S., 274 U. S. 343.....12, 17, 18
Rodgers v. U. S., 185 U. S. 83..... 12
Seaboard Air Line Rwy. v. United States, 261 U. S. 299.....6, 10, 11, 13, 17, 18
Shoemaker v. U. S., 147 U. S. 282..... 15
Templers etc. Co. v. Jarman, 187 U. S. 197..... 13
The Japanese Immigrant Case, 189 U. S. 86..... 13
United States v. Cress, 243 U. S. 316..... 6
United States v. Jones, 109 U. S. 513..... 9
United States v. Lynah, 188 U. S. 445.....9, 10
United States v. North American Co., 253 U. S. 330 .....6, 7, 11, 13, 14
United States v. Rogers, 255 U. S. 163.....5, 6, 11
U. S. v. First Natl. Bank, 250 Fed. 299..... 15
U. S. Babbitt, 95 U. S. 334..... 12
U. S. v. Wittberger, 5 Wheat. 76..... 12

Statutes and Other Citations.

Act of March 2, 1919 (40 Stat. 1275, 1282)..... 3
Judicial Code, Sec. 240 (a), as amended by Act of Feb. 13, 1925..... 2
Judicial Code, Sec. 177 (U. S. C., Title 28, Sec. 284)..2, 18
Revised Statutes, Sec. 1091..... 5
Rivers and Harbors Act of July 27, 1916..... 2
28 U. S. C. A., Secs. 41 (20), 284..... 5
U. S. C., Title 33, Secs. 591, 594..... 8, 9

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 15.

E. P. JACOBS and AUGUSTUS GUNTER, Executor of the Last Will of MRS. S. B. GUNTER, Deceased,
Petitioners,

vs.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONERS.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 38) is reported in 63 F. (2d) 326.

JURISDICTION.

The judgment sought to be reviewed was entered February 13, 1933 (R. 40). Petition for certiorari was

granted May 8, 1933 (R. 41). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether in a suit against the United States under the Tucker Act for the taking of a right of flowage over petitioners' lands resulting from the construction of a dam authorized by Act of Congress, petitioners may recover the equivalent of interest on the amount of damage to their lands at the time of the taking, as just compensation for delay in payment.

STATUTES INVOLVED.

Section 177 of the Judicial Code (U. S. C., Title 28, Sec. 284) provides:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. * * *"

The construction of Widow's Bar Dam was authorized by the Rivers and Harbors Act of July 27, 1916, by the following provision (39 Stat. 391, 399):

> "* * * for continuing improvement by the construction of locks and dams between Chattanooga, Tennessee, and Browns Island, Alabama, in accord-

ance with the report submitted in House Document numbered three hundred and sixty, Sixty-second Congress, Second Session, as modified by the report of the Board of Engineers for Rivers and Harbors printed in Rivers and Harbors Committee Document numbered one, Sixty-fourth Congress, First Session, $500,000:

"Provided, That no contract shall be entered into for the construction thereof until the local interests shall assume and pay all claims for flowage damage or arrange to do so in manner satisfactory to the Secretary of War: Provided, Further, that one high dam or two low dams may be constructed according as the local interests may contribute the cost of all claims for flowage damage arising from either type of dams, respectively."

The Act of March 2, 1919 (40 Stat. 1275, 1282) contained the following provision:

"Tennessee River, Tennessee, Alabama, and Kentucky.—The Secretary of War is hereby authorized to prosecute the work of improvement on the existing project for the section between Chattanooga and Browns Island in accordance with the recommendation in report submitted in Rivers and Harbors Committee Document numbered 8, Sixty-fifth Congress, Third Session, that the condition precedent requiring local interests to assume and pay all claims for flowage damages be waived."

STATEMENT.

The work was done by building a dam across the Tennessee River at Widow's Bar, some eight (8) miles below the lands of these petitioners, which impeded the natural flow of the river and caused flowage damage to petitioners' lands. This work was completed and the lands overflowed on October 1, 1925 (R. 22).

Later, the United States caused surveys to be made and ascertained that flowage easements in 115.2 acres of the lands of petitioner Jacobs, and 34.59 acres of the lands of petitioner Gunter's intestate, were actually taken by reason of the construction of this Widow's Bar Dam (R. 24). After negotiations and offers of settlement, each of petitioners brought these proceedings under the Tucker Act, in the United States District Court of their residence (R. 1-12).

At the first trial the District Judge dismissed the proceedings because the flooding was intermittent and petitioners had not been wholly evicted thereby (R. 13). By agreement, the Gunter case was held in court to await an appeal in the Jacobs case (R. 18). Upon appeal the Circuit Court of Appeals for the Fifth Circuit reversed the judgment in the Jacobs case and held that the land of petitioner had been taken, that he was entitled to just compensation therefor and remanded the case to ascertain the amount of just compensation (R. 13).

Jacobs v. U. S., 45 F. (2d) 34.

On the second trial the cases were consolidated (R. 19), and judgment was entered by the District Judge for the value of the land taken, together with interest at the rate of 6 per cent from the date of the taking, in favor of each of petitioners (R. 19). This was appealed by the United States (R. 31), and the Circuit Court of Appeals affirmed the judgment as to the value of the land taken, but denied interest from the date of the taking (R. 38). In ruling on this question the Circuit Court of Appeals said:

> "In condemnation proceedings instituted by the Government interest is allowed from the date of the actual taking as a part of just compensation under the Fifth Amendment (United States v. Rogers, 255 U. S. 163). As a general rule, however, except where otherwise provided by agreement or by the express words of a statute, interest is not recoverable in suits brought against the United States upon unpaid accounts or claims (Boston Sand Co. v. United States, 276 U. S. 41). And it is provided by statute that 'no interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest,' etc. (Revised Statutes, Sec. 1091; 28 U. S. C. A., Sec. 284). This statute applies equally to District Courts exercising jurisdiction under the Tucker Act 'concurrent with the Court of Claims' (28 U. S. C. A., Sec. 41 [20]). As the sovereign cannot be sued without its consent, it was competent for Congress in giving consent to suits against the United States upon private claims to impose the condition that such claims should not draw interest. Interest may not be collected 'when the Government

without instituting condemnation proceedings appropriates for a public use under legislative authority private property to which it asserts no title,' because the property owner's only right to bring suit against it in the Court of Claims or in a District Court is not founded upon the Fifth Amendment, but upon the existence of an implied promise or contract to pay the value of the property taken (United States v. North American Co., 253 U. S. 330). The just cited case is controlling on the question now under consideration. The suit there, as here, was held to be upon an implied contract. There is nothing in conflict with it in other Supreme Court decisions relied on by appellees. United States v. Rogers, 255 U. S. 163, and Seaboard Air Line Rwy. v. United States, 261 U. S. 299, were condemnation cases. In each, the North American case was referred to and distinguished on the ground that it was not a condemnation case. In United States v. Cress, 243 U. S. 316, in the course of the opinion the statement was made that the judgments entered in the court below included interest, and those judgments were affirmed. But it was not stated that the interest ran from the date the property was taken, and for all that appears interest was calculated only from the date of the judgment. In Hurley v. Kincaid, 285 U. S. 95, the question of interest was not considered." (R. 39).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in reversing the judgment of the District Court and holding that petitioners were not entitled to interest from the date of the taking of their property as just compensation for delay in payment.

SUMMARY OF THE ARGUMENT.

First. These proceedings are part of the authorized procedure instituted by the United States for the condemnation of land, and the measure of recovery in condemnation cases is applicable.

Second. The contract of the United States to pay just compensation for petitioners' land, which is implied from the fact of the taking, includes some equivalent for delay in payment. Interest, as allowed by the District Judge, is a good measure of that equivalent.

Third. The additional amount for which petitioners contend in these cases is not a claim for interest within the purpose and intention of Sec. 177 of the Judicial Code. It is a part of the "just compensation" guaranteed to them by the Constitution.

Fourth. The case of **North American Co. v. United States, 253 U. S. 330**, held to be controlling by the Circuit Court of Appeals, is distinguished from the instant cases.

Fifth. The holding of the Circuit Court of Appeals is contrary to and in conflict with prior decisions of this Court.

ARGUMENT.

First. The federal statutes make it the duty of the Secretary of War to institute proceedings for the condemnation

> "of any lands, easements or rights of way needed for a work of rivers and harbors improvements" (U. S. C., Title 33, Sec. 591),

and that the Secretary of War

> "shall have the right to take immediate possession of said lands, easements or rights of way, to the extent of the interest to be acquired" (U. S. C., Title 33, Sec. 594).

Under this authority the Secretary of War took "immediate possession" of petitioners' lands by the construction and closing of the dam on October 1, 1925. He then proceeded to ascertain the amount of the damage by surveys and make offer to pay the amount so ascertained (R. 25). Petitioners were not satisfied to accept the offers made and brought these proceedings, wherein it was adjudged that they were entitled to several times the amount offered (R. 28).

While the statute gives the right of "immediate possession" because the public necessity cannot wait on the procedure to ascertain the amount of the compensation,

title does not vest in the United States until the amount of compensation is ascertained and payment made.

Mason City & Ft. Dodge Rwy. Co. v. Boynton, 204 U. S. 570;
Cherokee Nation v. Southern Kansas Rwy. Co., 135 U. S. 641;
Kennedy v. Indianapolis, 103 U. S. 599;
Brownsville v. Cavazos, 100 U. S. 138;
United States v. Lynah, 188 U. S. 445.

The Constitution makes it the duty of the United States, before taking title to petitioners' lands, to ascertain and pay just compensation (Garrison v. Mayor etc. of New York, 88 U. S. 196), and the statute had charged the Secretary of War with the discharge of this duty (U. S. Code, Title 33, Sec. 591). The required proceeding to ascertain the amount of compensation to be paid is not an adverse lawsuit in the ordinary sense, but a mere "inquisition to establish a particular fact" (United States v. Jones, 109 U. S. 513). It is a necessary proceeding to complete the condemnation and vest title in the United States.

The flooding of petitioners' property by this dam across the Tennessee River, completed October 1, 1925, was a taking, from the time the dam was completed (U. S. v. Lynah, supra; Hurley v. Kincaid, 285 U. S. 95). This taking was pursuant to statute and lawful. The statutes also provided procedure for ascertaining the value. One

statute authorized the Secretary of War to institute the proceeding. Another statute authorized these petitioners to institute the proceedings in case the Secretary of War failed to do so (U. S. v. Lynah, supra; Hurley v. Kincaid, supra). The proceedings by these petitioners seek nothing except ascertainment of the just compensation due them. If these proceedings had been instituted in the name of the United States by the Secretary of War, the Court could do no more than adjudicate the amount of compensation due. The power of the Court and the question involved is exactly the same in both proceedings. One or the other is necessary to complete the condemnation, and vest title in the United States.

Second. It may well be doubted whether the fiction of implied contract is necessary to confer upon the District Court jurisdiction of proceedings of this kind, since the provisions of the Tucker Act carried into the U. S. Code at Sec. 41 (20), Title 28, embrace "claims not exceeding $10,000.00 founded upon the Constitution of the United States, * * * or for damages, liquidated or unliquidated, in cases not sounding in tort." It is also doubtful whether these suits are founded upon implied contracts.

Garrison v. Mayor etc. of New York, supra;
Seaboard Air Line Rwy. v. U. S., supra.

However, accepting the theory of implied contract, the question arises: What is the contract? The Circuit Court

of Appeals in the instant case had construed the contract to be that the United States would pay the value of the land taken, at some future time, when that value was ascertained.

We respectfully insist that such was not the contract which the law implies, because where the owner has been deprived of valuable use of his property, payment at some future time is not "just compensation," within the constitutional requirement.

Bowman v. Ross, 167 U. S. 548;
U. S. v. North American Co., supra;
U. S. v. Rogers, supra;
Seaboard Air Line Rwy. v. U. S., supra.

Since the payment of just compensation is a condition precedent to vesting title, the implied contract must be to pay "just compensation" as required by the Constitution and defined by this Court.

Such just compensation includes more than the value at the time of the taking, paid at a subsequent time. It includes interest or some other equivalent for the delay in payment. Hence, we insist that the contracts included some equivalent for the delay in payment and that interest as allowed by the District Judge is "a good measure" of that equivalent.

Seaboard Air Line Rwy. v. U. S., supra;
U. S. v. Rogers, supra.

Third. In the instant cases the per cent added by the District Judge for delay was a part of the "claim" itself, and not interest added within the meaning of Sec. 177 of the Judicial Code (Phelps v. U. S., 274 U. S. 343). It may be called interest only in the sense that it is part of what the contracts "stipulate" shall be paid. In that sense it comes within the meaning of this statute as interest "expressly" stipulated. This view is supported by these rules of construction:

A contract is to be construed according to the intention of the parties, and what is implied is as effectual as what is expressed.

> Equitable Ins. Co. v. Hearne, 20 Wall. 494;
> U. S. v. Babbitt, 95 U. S. 334.

A statute is to be construed to effectuate the legislative intention, and a case within the intention must be considered within the letter of the statute.

> U. S. v. Wittberger, 5 Wheat. 76;
> Ingleheart v. Ingleheart, 204 U. S. 478;
> Rodgers v. U. S., 185 U. S. 83.

Here we have implied contracts which included interest or other equivalent for the delay in payment. We are considering the application to these contracts of a statute, the purpose of which was to prohibit the allowance of interest unless interest was intended by the parties. The words "unless upon a contract expressly stipulating for

the payment of interest," as used in this statute, must be construed to mean that it shall appear to the Court that the parties intended the payment of interest. Otherwise, the letter of the statute will defeat the purpose of the parties and impair the obligations of the contract.

Templers etc. Co. v. Jarman, 187 U. S. 197.

Another applicable rule is to adopt that construction which will save the constitutionality of the statute.

Grenada Co. Supervisors v. Brown, 112 U. S. 261;
The Japanese Immigrant Case, 189 U. S. 86;
Miller v. U. S., 11 Wall. 268.

If the statute is construed to limit the power of the Court to award just compensation, then it is invalid, because "just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function."

Seaboard Air Line Rwy. v. U. S., supra;
Monongahela Nav. Co. v. U. S., 148 U. S. 312.

Fourth. The Circuit Court of Appeals applied to the instant cases the holding of this Court in U. S. v. North American Co., supra.

We insist that case is distinguished from the instant cases on these grounds:

(a) The District Judge found as a fact in these cases

that the addition of 6 per cent per annum was necessary to give petitioners the just compensation to which they were entitled.

In the North American case there was no such finding. On the contrary, this Court, in its opinion, says:

> "The facts found fail to supply the basis on which any claim in addition to that for the value of the property should rest" (253 U. S. 338).

(b) The instant cases are necessary parts of condemnation proceedings to ascertain the value of property taken for public use by an officer of the United States pursuant to statutes authorizing the taking.

The North American case was not a condemnation proceeding. It was brought to recover the value of property which had been seized by a general of the United States Army without authority. The suit had been pending two years before the United States took legal possession of the property. The second count of the petition was for rent alleged to have accrued during the time the property was unlawfully held. For this the United States was not liable, nor was it liable for the property itself when the suit was brought. It became liable before judgment, and the amount of that liability was allowed. The Court referred to the fact that there was a long delay in the litigation as a matter for which the owner may have been largely responsible.

The claim of the owner was that interest accrued as a

matter of law. This claim was rejected and interest denied in accordance with the rule that interest is not to be added unless necessary to give to the owner just compensation.

Shoemaker v. U. S., 147 U. S. 282.

(c) The property for which compensation is sought in the instant cases is situated in the State of Alabama. The laws of that state "relating to suit for condemnation of property" provide that interest shall be added from the time of the taking.

Jones v. N. O. & S. R. R. Co., 70 Ala. 227;
U. S. v. First Natl. Bank, 250 Fed. 299.

The federal statute under which this property was taken provides that proceedings to ascertain the value

> "shall be prosecuted in accordance with the laws relating to suits for the condemnation of property of the state wherein the proceeding may be instituted (U. S. Code, Title 22, Sec. 591).

This statute adopts the local law as the applicable rule in these cases.

In the North American case the property was situated in Alaska. There was no local law to be adopted, and the opinion of this Court distinguished that case from cases controlled by the local laws of the states on that ground (253 U. S. 335).

Fifth. If the rule announced by the Circuit Court of Appeals in this case prevails, then the amount which the landowner will receive for property taken for public use will be greater when the United States institutes the proceedings for condemnation than it will be if the landowner, after negotiating for some years, is compelled to institute and prosecute such proceedings through the courts. In this case six years elapsed and the recovery of the landowners was increased 36 per cent because of the delay. If the landowner must suffer this much loss because the United States failed to institute proceedings for condemnation, then the remedy which is afforded to him by suit at law is not adequate. In justice, he ought to be permitted to maintain injunction against the United States to restrain it from taking possession until or unless condemnation proceedings are instituted by it or payment is made at the time of the taking.

But this Court has ruled that he cannot maintain such injunction because his remedy at law will give the same compensation.

Hurley v. Kincaid, supra.

In the instant case the lower court disposed of the above-cited holding of this Court with the statement: "The question of interest was not considered." We most respectfully insist that the question of interest was considered and ruled with petitioners' contention. The ground of the decision of this Court in the Hurley case was that

the measure of compensation is the same, regardless of the procedure to ascertain it. In so holding, this Court necessarily considered that interest will be added in the one proceeding as well as in the other when the rule of just compensation requires it.

In Seaboard Air Line Rwy. v. U. S., supra, this Court held that in a suit brought in the District Court against the United States to recover just compensation for property taken, plaintiff was entitled to recover interest from the date of the taking, as a "good measure" of the equivalent for delay in payment.

Of that case this Court said:

> "This suit is a part of the authorized procedure instituted by the United States for the condemnation of land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. * * * The only question here is whether the payment at a subsequent date of the value of the land as of the date of the taking is sufficient to constitute just compensation. * * *
>
> "The requirement that just compensation shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation" (261 U. S. 299).

In Phelps v. U. S., supra, this Court held that in a suit brought in the Court of Claims against the United States

to recover the rental value of a pier in the New York harbor, requisitioned for war purposes, the plaintiff was entitled to interest for delay in payment as part of just compensation.

It was insisted there as here that Sec. 177 of the Judicial Code prohibited the allowance of interest. This Court said:

> "Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking" (274 U. S. 343).

In the case of Seaboard Air Line Rwy. v. U. S., supra, the action in the District Court was authorized by the same statute which authorized the taking. Here, the taking was authorized by one statute, and the action by another. This should not distinguish the cases. There is no other difference.

In Phelps v. U. S., supra, the taking was authorized by one statute and the action by another, just as here.

In those suits, the property was taken for war pur-

poses. Here, it was taken for navigation purposes. But, the same constitutional requirement of just compensation applied alike in those cases as here.

For those reasons, we insist that the Circuit Court of Appeals erred, and its decision should be reversed.

Respectfully submitted,

CHARLES C. MOORE,
Attorney for Petitioners.

KELLY & KELLY,
Of Counsel.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	5
Conclusion	6

CITATIONS

Cases:

Angarica v. *Bayard*, 127 U.S. 251	5
Boston Sand & Gravel Co. v. *United States*, 278 U.S. 41	5
Jacobs v. *United States*, 45 F. (2d) 34	4
National Volunteer Home v. *Parrish*, 229 U.S. 494	5
Phelps v. *United States*, 274 U.S. 341	5
Seaboard Air Line Ry. v. *United States*, 261 U.S. 299	5
United States v. *Commonwealth & Dominion Line, Ltd.*, 287 U.S. 427	5
United States v. *North American Co.*, 253 U.S. 330	5
United States v. *Verdier*, 164 U.S. 213	5

Statutes:

Sec. 177, Judicial Code, U.S.C., title 28, sec. 284	2
Act of July 27, 1916 (c. 260, 39 Stat. 391, 399)	2–3
Act of March 2, 1919 (c. 95, 40 Stat. 1275, 1282)	3

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 806

E. P. JACOBS AND AUGUSTUS GUNTER, EXECUTOR OF the Last Will of Mrs. S. B. Gunter, Deceased, petitioners

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 163) is reported in 63 F. (2d) 326.

JURISDICTION

The judgment sought to be reviewed was entered February 13, 1933 (R. 163). Petition for certiorari was filed March 27, 1933. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in a suit against the United States under the Tucker Act for the taking of a right of flowage over petitioners' lands resulting from the construction of a dam authorized by Act of Congress, petitioners may recover interest on the amount of damage to their lands from the time of the completion of the dam.

STATUTES INVOLVED

Sec. 177 of the Judicial Code (U.S.C., Title 28, Sec. 284) provides:

> SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *.

The construction of Widow's Bar Dam was authorized by the Rivers and Harbors Act of July 27, 1916, by the following provision (39 Stat. 391, 399):

> * * * for continuing improvement by the construction of locks and dams between Chattanooga, Tennessee, and Browns Island, Alabama, in accordance with the report submitted in House Document Numbered Three hundred and sixty, Sixty-second Congress, second session, as modified by the report of the Board of Engineers for Rivers and Harbors printed in Rivers and Harbors Committee Document Numbered One, Sixty-fourth Congress, first session, $500,000:

> *Provided,* That no contract shall be entered into for the construction thereof until the local interests shall assume and pay all claims for flowage damage or arrange to do so in manner satisfactory to the Secretary of War: *Provided, further,* That one high dam or two low dams may be constructed according as the local interests may contribute the cost of all claims for flowage damage arising from either type of dams, respectively:

The Act of March 2, 1919 (40 Stat. 1275, 1282) contained the following provision:

> Tennessee River, Tennessee, Alabama, and Kentucky: The Secretary of War is hereby authorized to prosecute the work of improvement on the existing project for the section between Chattanooga and Browns Island in accordance with the recommendation in report submitted in Rivers and Harbors Committee Document Numbered 8, Sixty-fifth Congress, third session, that the condition precedent requiring local interests to assume and pay all claims for flowage damages be waived.

STATEMENT

Petitioner Jacobs filed a suit against the United States in the United States District Court for the Northern District of Alabama, alleging that he was the owner of a tract of land situated on Jones Creek, a tributary of the Tennessee River, that part of this land was destroyed and "taken" by

overflow resulting from the construction of Widow's Bar Dam across the Tennessee River, and that damages were sustained in the amount of $10,000.00. (R. 3–10.)—

On the first trial of the case, the District Court rendered judgment for the United States (45 F. (2d) 34, 36). This judgment was reversed by the Circuit Court of Appeals for the Fifth Circuit (45 F. (2d) 34) and the case was remanded to the lower court (R. 23). The case was then consolidated by the District Court with *Gunter, etc.* v. *United States,* and the two cases were tried together (R. 32).

The *Gunter case* involved a suit similar to that in the *Jacobs case,* and related to adjacent lands. The petition alleged that petitioner's decedent was the owner of a tract of land situated on the Tennessee River, that part of this land had been taken and destroyed by overflow, and that damages were sustained to the amount of $9,500.00 (R. 12–19).

On the second trial of these cases, the District Court made findings of fact (R. 36–44), finding that petitioner Jacob's farm suffered damage to the amount of $2,919.00, and that petitioner Gunter's farm was damaged to the amount of $1,030.00 (R. 43–44). Judgment was entered in favor of petitioner for these respective amounts, with interest at six per cent from the date of completion of the dam to the time of payment, together with the costs of the previous appeal, such costs "not

to exceed that allowed by law under Section 152, Judicial Code" (R. 33–36).

This judgment was reversed by the court below in so far as it awarded interest and costs (R. 163). The present petition raises only the question of petitioners' right to interest.

ARGUMENT

Interest may not be allowed in a suit against the United States in the absence of an express agreement or statutory authority for its payment. Section 177 of the Judicial Code; *Boston Sand and Gravel Co.* v. *United States,* 278 U.S. 41; *United States* v. *Commonwealth and Dominion Line, Ltd.,* 278 U.S. 427; *National Volunteer Home* v. *Parrish,* 229 U.S. 494; *United States* v. *Verdier,* 164 U.S. 213; *Angarica* v. *Bayard,* 127 U.S. 251. There is no statute allowing interest involved here, nor was there an express contract providing for interest.

The court below held that this action was based on an implied promise to pay the value of the land taken and that decision was controlled by *United States* v. *North American Co.,* 253 U.S. 330, and that recovery for interest must accordingly be denied. That case has not been overruled, although it has been distinguished in *Seaboard Air Line Ry.* v. *United States,* 261 U.S. 299, and *Phelps* v. *United States,* 274 U.S. 341, and the rule of that case has not been applied in condemnation suits or where land has been taken under statutes providing just

compensation for the taking. The taking involved here was not pursuant to a statute providing for the payment of just compensation. As the *North American Co. case* seems clearly in point and since it has not been overruled, we believe it is unnecessary to discuss the decisions upon which petitioners rely, and we oppose the petition.

CONCLUSION

Since the case seems to be controlled by a decision of this Court, the petition should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
WHITNEY NORTH SEYMOUR,
Special Assistant to the Attorney General.
WILLIAM W. SCOTT,
W. S. WARD,
Attorneys.

APRIL 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Summary of argument	5
Argument	6
Conclusion	21

CITATIONS.

Cases:

Boston Sand & Gravel Co. v. *United States*, 278 U.S. 41 — 7

Campbell v. *United States*, 266 U.S. 368 — 13

Hurley v. *Kincaid*, 285 U.S. 95 — 17

Liggett & Myers Tobacco Co. v. *United States*, 274 U.S. 215 — 6, 14, 20

Phelps v. *United States*, 274 U.S. 341 — 6, 14, 19, 20

Seaboard Air Line Ry. v. *United States*, 261 U.S. 299 — 7, 11, 16, 19

United States v. *Commonwealth & Dominion Line*, 278 U.S. 427 — 7

United States v. *North American Co.*, 253 U.S. 330 — 5, 6, 7, 9, 13, 16, 17, 18, 19, 21

United States v. *Pfitsch*, 256 U.S. 547 — 19

United States v. *Rogers*, 255 U.S. 163 — 9

United States v. *Verdier*, 164 U.S. 213 — 7

Waite v. *United States*, 282 U.S. 508 — 19

Statutes:

Judicial Code, Sec. 177 (U.S.C., Title 28, Sec. 284) — 2

Act of April 24, 1888, c. 194, 25 Stat. 94 (U.S.C., Title 33, Sec. 591) — 3

Act of July 27, 1916, c. 260, 39 Stat. 391, 399 — 2

Act of March 2, 1919, c. 95, 40 Stat. 1275, 1282 — 3

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 15

E. P. JACOBS AND AUGUSTUS GUNTER, EXECUTOR OF the Last Will of Mrs. S. B. Gunter, Deceased, petitioners

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings and conclusions of the District Court (R. 21–27) are not reported. The opinion of the Circuit Court of Appeals (R. 38–40) is reported in 63 F. (2d) 326.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 13, 1933. (R. 40.) The petition for certiorari was filed March 27, 1933, and was granted May 8, 1933 (289 U.S. 719). The jurisdiction of this Court rests on Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a suit against the United States under the Tucker Act for the taking of a right of flowage over petitioners' lands, resulting from the construction of a dam authorized by an Act of Congress, the petitioners may recover interest on the amount of damage to their lands from the time of the completion of the dam.

STATUTES INVOLVED

Section 177 of the Judicial Code as amended (U.S.C., Title 28, Sec. 284) provides:

> SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

The construction of Widow's Bar Dam was authorized by the Rivers and Harbors Act of July 27, 1916, by the following provision (39 Stat. 391, 399):

> * * * for continuing improvement by the construction of locks and dams between Chattanooga, Tennessee, and Browns Island, Alabama, in accordance with the report submitted in House Document Numbered Three hundred and sixty, Sixty-second Congress, second session, as modified by the report of the Board of Engineers for Rivers and Harbors printed in Rivers and Harbors

> Committee Document Numbered One, Sixty-fourth Congress, first session, $500,000: *Provided,* That no contract shall be entered into for the construction thereof until the local interests shall assume and pay all claims for flowage damage or arrange to do so in manner satisfactory to the Secretary of War: *Provided further,* That one high dam or two low dams may be constructed according as the local interests may contribute the cost of all claims for flowage damage arising from either type of dams, respectively: * * *

The Act of March 2, 1919 (40 Stat. 1275, 1282), contained the following provision:

> Tennessee River, Tennessee, Alabama, and Kentucky: The Secretary of War is hereby authorized to prosecute the work of improvement on the existing project for the section between Chattanooga and Browns Island in accordance with the recommendation in report submitted in Rivers and Harbors Committee Document Numbered 8, Sixty-fifth Congress, third session, that the condition precedent requiring local interests to assume and pay all claims for flowage damages be waived.

The Act of April 24, 1888, c. 194, 25 Stat. 94 (U.S.C., Title 33, Sec. 591), provides as follows:

> That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquire-

ment by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: * * *.

STATEMENT.

The petitioner Jacobs filed a suit against the United States in the United States District Court for the Northern District of Alabama, alleging that he was the owner of a tract of land situated on Jones Creek, a tributary of the Tennessee River, that part of this land was destroyed and "taken" by overflow resulting from the construction of Widow's Bar Dam across the Tennessee River, and that damages were sustained in the amount of $10,000.00. (R. 3–6.)

On the first trial of the case, the District Court rendered judgment for the United States. This judgment was reversed by the Circuit Court of Appeals for the Fifth Circuit (45 F. (2d) 34) and the case was remanded to the lower court (R. 13–14). The case was then consolidated by the District Court with *Gunter* v. *United States,* and the two cases were tried together. (R. 19.)

The *Gunter* case involved a suit similar to that in the *Jacobs* case, and related to adjacent lands. The petition alleged that the petitioner's decedent

was the owner of a tract of land situated on the Tennessee River; that part of this land had been taken and destroyed by overflow, and that damages were sustained in the amount of $9,500.00. (R. 6–12.)

On the second trial, the District Court made findings of fact (R. 21–27), from which it appears that the petitioner Jacobs's farm suffered damage to the amount of $2,919.00 and that the petitioner Gunter's farm was damaged to the amount of $1,030.00 (R. 26–27), by reason of the taking on October 1, 1925, of an easement of flowage. Judgment was entered in favor of petitioners for these respective amounts, with interest at six percent from October 1, 1925, the date of completion of the dam, to the time of payment, together with the costs of the previous appeal. (R. 19–21.)

This judgment was reversed by the court below in so far as it awarded interest and costs on appeal. (R. 40.) The present petition raises only the question of petitioners' right to interest.

SUMMARY OF ARGUMENT

The rule has frequently been declared that in the absence of an express agreement or of statutory authority interest may not be allowed on a claim against the United States. Although this rule is unquestioned, its application in "just compensation" cases is a matter of difficulty.

The present case is a suit under the Tucker Act based upon an implied contract. *United States* v.

North American Co., 253 U.S. 330, was just such a case and is direct authority for the position that the claimants here are not entitled to interest. In several more recent cases, interest has been allowed in suits brought under the Tucker Act. *Liggett & Myers Tobacco Co.* v. *United States*, 274 U.S. 215; *Phelps* v. *United States*, 274 U.S. 341. But these have all been cases where the taking was under the Lever Act, or a similar statute expressly authorizing the payment of "just compensation." Although they decide that "just compensation" includes interest, it does not necessarily follow that interest must be paid on a claim based on an implied contract. There is language in some of these cases, particularly the *Phelps* case, which is difficult to reconcile with the decision in the *North American* case.

If the rule of the *North American* case is still to be followed, the judgment below should be affirmed. Whether that rule should be modified in view of the reasoning in the *Phelps* case and in other cases is a question for the consideration of this Court.

ARGUMENT

Section 177 of the Judicial Code (*supra*, p. 2) provides that—

> No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

This Court has frequently declared the rule that in the absence of an express agreement or of statutory authority interest may not be allowed on a claim against the United States. *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41; *United States* v. *Commonwealth & Dominion Line,* 278 U.S. 427; *Seaboard Air Line Ry.* v. *United States,* 261 U.S. 299, 304; *United States* v. *Verdier,* 164 U.S. 213. Although this rule is well established, its application in "just compensation" cases is a matter of difficulty. It will be helpful, we believe, to present a brief resume of several of the cases bearing on this particular question.

In *United States* v. *North American Co.,* 253 U.S. 330, it was held that the rule precluding interest is applicable to a suit against the United States under the Tucker Act for a taking of private property, that such a suit is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States, and that the contract which is implied is to pay the value of the property as of the date of the taking. Consequently it was held that interest might not be added because of Section 177 of the Judicial Code. This case, it would seem, governs the case at bar, unless the ruling has been modified by later decisions of the Court. We quote from the opinion (pp. 334–338):

> The company contends that it should receive, in addition to the value of the prop-

erty at the time of the taking, compensation for the occupation and use thereof from that date to the date of the judgment—a period of nearly twenty years during which the company was deprived of the use of its property. * * *

The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment * * *, but upon the existence of an implied contract entered into by the United States. * * * And the contract which is implied is to pay the value of property as of the date of the taking. * * * Interest may not be added because § 177 of the Judicial Code, re-enacting § 1091 of the Revised Statutes, declares that: "No interest shall be allowed on any claim * * *."

* * *

The company argues that interest is allowed in condemnation proceedings, not *qua* interest for default or delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title * * *. This may be the theory on which interest should be allowed in compensation proceedings; and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the Government. For, * * * such a proceeding is not a suit by the landowner to collect a claim

> against the United States, but an adversary proceeding in which the owner is the defendant and which the Government institutes in order to secure title to land. * * * On the other hand, this suit brought in the Court of Claims is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. * * * that which the Company seeks to recover is, in substance, interest, and that Congress has denied to the Court of Claims power to allow.

The court below, referring to the *North American* case, stated (R. 39–40):

> The just cited case is controlling on the question now under consideration. The suit there as here was held to be upon an implied contract. There is nothing in conflict with it in other Supreme Court decisions relied on by appellees. United States v. Rogers, supra, and Seaboard Air Line Ry. v. United States, 261 U.S. 299, were condemnation cases. In each the North American case was referred to and distinguished on the ground that it was not a condemnation case.

United States v. *Rogers,* 255 U.S. 163, was an action brought in the District Court of the United States for New Mexico, to condemn lands of the defendant for reclamation purposes. The Court said (pp. 168–169):

Was there error in awarding the owners interest on the value of their lands appropriated from the time of actual taking of the same until compensation was made?

It is unquestionably true that the United States upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. * * * In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U.S. 330. The Government was seeking for purposes authorized by statute to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.

Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property. * * *

In fixing the compensation, the District Court, and the Circuit Court of Appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6 percent. * * *

The Government urges that the Conformity Act of August 1, 1888, does not require the United States Government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we

> agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. * * *

In suits against the United States under the Lever Act, and similar legislation for the taking of private property, the statutes conferring authority to take also provided the remedy, and directed the payment or recovery of "just compensation." In such cases this Court has held that interest must be added to the value of the property as a part of the just compensation.

Seaboard Air Line Railway Co. v. *United States*, 261 U.S. 299, was an action brought in the District Court of South Carolina against the United States, under Section 10 of the Lever Act, to recover just compensation for property taken for public use. The jury found that $6,000 was the value of the property at the time of the taking, and judgment was entered for $6,000, with interest from the date of taking at seven percent, the statutory rate in South Carolina. The Circuit Court of Appeals reversed the District Court. This Court reversed the Circuit Court of Appeals and affirmed the decree of the District Court, allowing interest.

This Court said (pp. 304–305):

> The rule is that, in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the

United States upon unpaid accounts or claims. * * *

Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. * * *

The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. * * * It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. * * * He is entitled to the damages inflicted by the taking. * * *

The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained. * * *

The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. * * * The only question here is whether payment at a sub-

> sequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation.

This Court then distinguished the *North American* case as follows (p. 305):

> In support of its contention the Government cites *United States* v. *North American Transportation & Trading Co.*, 253 U.S. 330. That case does not sustain its contention. That was a suit in the Court of Claims based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it adopted by the conformity provisions.

In *Campbell* v. *United States*, 266 U.S. 368, land was taken for a site for a nitrate plant. This Court held (pp. 370–371):

> The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands. * * * And from the taking there arose an implied promise by the United States to compensate plaintiff for his loss. * * * Thereupon he became entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is, the value of

> the land taken and the damages inflicted by the taking—such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken.

Liggett & Myers Tobacco Co. v. *United States,* 274 U.S. 215, was an action brought by the Tobacco Company in the Court of Claims to recover a balance claimed for tobacco products obtained from it for the Navy and Marine Corps. The Court of Claims found the value but refused to allow interest or its equivalent. The claimant contended that the products were taken under the power of eminent domain and that it was entitled to such additional sum as would produce the equivalent of their value paid at the time of taking, and that interest at a reasonable rate was the measure of the amount required to be added in order to make just compensation.

This Court said (p. 218) that "the sole question is whether the facts found constitute a taking by eminent domain," and then, after reviewing the evidence, concluded that (p. 220): "The findings show that plaintiff's property was taken by eminent domain; and its just compensation includes the additional amount claimed."

Phelps v. *United States,* 274 U.S. 341, was a suit brought against the United States in the Court of Claims for a taking under the authority of the Act of August 29, 1916, c. 418, 39 Stat. 619, 645, and the Act of August 10, 1917, Sec. 10, c. 53, 40 Stat. 276, 279, known as the Lever Act.

The plaintiff contended (p. 343) that "there should be added such sums as will produce the equivalent of the value of the use of the leased property paid contemporaneously; and that interest at a reasonable rate from the date of the use to the time of payment is a good measure of the amount to be added in order to make just compensation." The Court of Claims held against the plaintiff and this Court reversed the lower court.

This Court said (p. 343):

> This action was brought under § 145 of the Judicial Code. That section gives to the Court of Claims jurisdiction to hear and determine "all claims (except for pensions) founded upon the Constitution of the United States or * * * upon any contract, express or implied, with the Government of the United States * * *." Section 177 provides that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for its payment. Under the Fifth Amendment plaintiffs were entitled to just compensation; and, within the meaning of § 145, the claim is one founded on the Constitution. Moreover, it has long been established that, where pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the Government is under an implied obligation to make just compensation. That implication being consistent with the constitutional duty of the Government

> as well as with common justice, the owner's claim is one arising out of implied contract. * * *

In distinguishing the *North American* case, this Court said (pp. 343–344):

> The distinction between the cause of action considered in *United States* v. *North American Co.*, 253 U.S. 330, and a taking under the power of eminent domain was pointed out in *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299.

The Court then concluded as follows (p. 344):

> Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. * * *

In *Hurley* v. *Kincaid*, 285 U.S. 95, an owner of land brought suit praying for an injunction to prevent the Government from carrying out work authorized by the Mississippi River Flood Control Act, without first instituting condemnation proceedings. This Court dismissed the bill, holding that the complainant has a plain, adequate, and complete remedy at law. The Court said (p. 104):

> If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. * * * The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires.

This language, if it refers to compensation as of the date of the taking is in accordance with *United States* v. *North American Co.*, 253 U.S. 330. The question of interest was not before the Court. The Court stated, as in the *North American* case, that the suit under the Tucker Act is founded upon an implied contract, and there is no suggestion that it intended to depart from the *North American Co.* case as to the nature of that implied contract, or as to the prohibition of interest in such suits.

The Act of April 24, 1888, c. 194, 25 Stat. 94 (U.S.C., Title 33, Sec. 591; *supra,* p. 3), authorizes the Secretary of War to institute proceedings to acquire by condemnation any land which is needed for the improvement of rivers and harbors for which provision has been made by law. Such proceedings are to be prosecuted in accordance with the laws of the State where the suit is brought. In the instant case, however, no such proceedings were instituted. There was no taking here in the nature of a condemnation under the Lever Act, or similar statute. We submit that the jurisdiction of the trial court in this case depends solely upon the existence of an implied contract, and that interest may not be included in the damages in such a suit if *United States* v. *North American Co.* is still law.

In the *North American* case, the property was taken by the Government under its power of eminent domain pursuant to a statute similar to the one involved in the instant case. No condemnation suit was brought by the Government prior to the taking. The owner brought suit in the Court of Claims under the Tucker Act. This Court held that the right to bring the suit in the Court of Claims was not founded upon the Fifth Amendment, but upon an implied contract to pay the value of the property at the date of taking, and that interest might not be added because of Section 177 of the Judicial Code.

It would seem clear that the case at bar is governed by the *North American* case, as held by the court below, unless the rule of that case has been modified by the later decisions referred to above. In at least three of these cases the *North American* case is distinguished, but not overruled. It is, however, difficult to reconcile the *North American* case with some of the later decisions.

The distinction made in the *Seaboard Air Line* case, and referred to in the *Phelps* case, is that the *North American* case was not a condemnation case, but a suit based on an implied contract to pay for the property. In the *Seaboard Air Line* case the taking was under the Lever Act, and the owner brought suit in the District Court under the provisions of that Act expressly directing the payment of "just compensation." This Court decided that the just compensation provided by the statute included interest. Cf. *Waite* v. *United States,* 282 U.S. 508. In the *Phelps* case, while the taking was under the Lever Act, the claim was not prosecuted under the procedure provided by that Act. Phelps brought his suit in the Court of Claims, a court which had no jurisdiction of a claim under Section 10 of the Lever Act. *United States* v. *Pfitsch,* 256 U.S. 547. This Court held that the claim was founded on the Fifth Amendment and that there was an implied obligation to make just compensation. If the decision stood on this ground alone, it might be reconcilable with the *North American*

case, which was distinguished in the opinion. But the Court also held that the owner's claim was one arising out of implied contract, but that, nevertheless, Section 177 of the Judicial Code did not prohibit the inclusion of interest, because the claim was not for interest within the meaning of that section. The *Liggett & Myers* case was also a suit in the Court of Claims under the Tucker Act. This Court held that the claimant's property was taken by eminent domain and that its just compensation included interest.

In the *Phelps* and *Liggett & Myers* cases the taking was in each case under the provisions of a statute which expressly provided for the payment of "just compensation." Neither of the suits, however, was brought under that statute; both were suits under the Tucker Act in the general jurisdiction of the Court of Claims. It is possible, however, that the fact that the taking was under the Lever Act, or a statute similar to it, may have influenced the result.

In the case at bar, as in the *North American* case, the only statute involved is a general statute authorizing the construction of improvements, making no express provision for the payment of "just compensation" and setting up no procedure for the bringing of suit by the claimant in case the Government failed to start condemnation proceedings. The claimant's case, therefore, cannot rest directly on the terms of any statute

(unless it is held to be a claim under the Constitution within the Tucker Act), but must depend on the existence of an implied contract. In a suit brought on such a basis the *North American* case holds that interest may not be included in the damages allowed.

CONCLUSION

If the rule of the *North American* case is still to be followed, the judgment below should be affirmed. Whether that rule has been modified by the *Phelps* case and the other cases referred to is a question for the consideration of this Court.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
FRANK J. WIDEMAN,
Assistant Attorney General.
WILLIAM W. SCOTT,
W. S. WARD,
Attorneys.

OCTOBER 1933.

U.S. GOVERNMENT PRINTING OFFICE: 1933

SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1933.

E. P. Jacobs and Augustus Gunter, Executor of the last will of Mrs. S. B. Gunter, Deceased, Petitioners, *vs.* The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 6, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner Jacobs and the testator of petitioner Gunter owned farms lying along Jones Creek, a tributary of the Tennessee River, in Jackson County, Alabama. Across this river the United States constructed Widow's Bar Dam under authority of Acts of Congress, 39 Stat. 399; 40 Stat. 1282. Surveys by the Government showed that the construction of the dam caused an increase in the occasional overflows of petitioners' lands and negotiations followed for the purchase of easements of flowage. Offers of settlement being deemed to be inadequate, petitioners brought separate suits under the Tucker Act (28 U. S. C., section 41 (20)) to recover compensation for the property taken. The Circuit Court of Appeals, reversing the judgment of the District Court in the suit of Jacobs, held that he was entitled to compensation. 45 F. (2d) 34. Thereupon, the two suits were consolidated and petitioners had judgment. The District Court found that they were entitled to the amount of damage caused by the construction of the dam as of the date of its completion (October 1, 1925), "together with interest thereon at 6 per cent from the date of said taking until now as just compensation under the Fifth Amendment to the Constitution of the United States". On appeal by the Government the Circuit Court of Appeals held that interest was not recoverable. 63 F. (2d) 326. This Court granted certiorari. 289 U. S. 719.

The only question before us is as to the right to the item of interest. The Government contemplated the flowage of the lands, that damage would result therefrom, and that compensation would

be payable. A servitude was created by reason of intermittent overflows which impaired the use of the lands for agricultural purposes. 45 F. (2d) p. 37; 63 F. (2d) p. 327. There was thus a partial taking of the lands for which the Government was bound to make just compensation under the Fifth Amendment. *United States* v. *Cress*, 243 U. S. 316, 327-329; *United States* v. *Lynah*, 188 U. S. 445, 470; *Hurley* v. *Kincaid*, 285 U. S. 95, 104. The Circuit Court of Appeals, distinguishing the present suits from condemnation proceedings instituted by the Government, held that the suits were founded upon an implied contract and hence that interest could not be allowed, citing *United States* v. *North American Co.*, 253 U. S. 330.

This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. 28 U. S. C. 41 (20).

The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, "and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation". The owner is not limited to the value of the property at the time of the taking; "he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking". Interest at a proper rate "is a good measure by which to ascertain the amount so to be added". *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 306. That suit was brought by the owner under section 10 of the Lever Act which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allow-

ance was appropriate in order to make the compensation adequate. See, also, *United States* v. *Rogers*, 255 U. S. 163, 169.

The principle was restated in *United States* v. *Phelps*, 274 U. S. 341. There the suit was brought in the Court of Claims, and that court gave judgment for the value of the property as it was found to be at the time of the requisition. Plaintiffs insisted that they were entitled to an additional amount to produce the equivalent of the value of the property "paid contemporaneously" and that, for this purpose, interest as a reasonable measure should be allowed. This Court sustained the claim. The Court held that judgment in 1926 for the value of the use of the property in 1918 or 1919, without more, was not sufficient to constitute just compensation; that the claim was not for "interest" within the meaning of section 177 of the Judicial Code (28 U. S. C. 284) and that that provision did not preclude the recovery of the additional amount asked. To the same effect are *Brooks-Scanlon Corporation* v. *United States*, 265 U. S. 106, 123; *Liggett & Myers* v. *United States*, 274 U. S. 215.

The case of *United States* v. *North American Company, supra*, cannot be regarded as establishing a different rule for the instant case. See *Seaboard Air Line R. Co.* v. *United States, supra*, p. 305; *Phelps* v. *United States, supra*, pp. 343, 344. The *North American* case rested upon its special facts. There the original taking was tortious and created no liability on the part of the Government. Subsequent action was held to create a liability which rested upon an implied contract. The Court said that the suit was not founded upon the Fifth Amendment. 253 U. S. pp. 334, 335. Suits brought to enforce the constitutional right to just compensation are governed by the later decisions which are directly in point.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.